(20)

No. 95-346-CFX
Status: GRANTED

Title: United States, Petitioner
v.
$405,089.23 in U. S. Currency, et al.

Docketed:
August 28, 1995

Court: United States Court of Appeals for the Ninth Circuit

Vide:
95-345

Counsel for petitioner: Solicitor General

Counsel for respondent: Finer,Jeffrey K., Michael,David M.

See also:
95-345

NOTE: Opinion amended 5-30-95. 9th Circuit called 9/6/95. Correct lower court case no. is 93-55947.

Entry	Date	Note	Proceedings and Orders
1	Aug 28 1995	G	Petition for writ of certiorari filed.
3	Sep 29 1995		Order extending time to file response to petition until October 30, 1995.
4	Oct 2 1995		Brief amici curiae of Massachusetts, et al. filed.
5	Nov 1 1995		DISTRIBUTED. November 22, 1995 (Page 2)
6	Nov 3 1995		Waiver of right of respondent Charles Wren to respond filed.
7	Nov 20 1995	P	Response requested -- AMK. (Due December 21, 1995)
8	Nov 22 1995		Brief of respondent Charles Wesley Arlt in opposition filed.
9	Nov 22 1995	G	Motion of respondent Charles Wesley Arlt, Sr. for leave to proceed in forma pauperis filed.
10	Dec 21 1995		Brief of respondent Charles Wren in opposition filed.
12	Dec 26 1995	X	Reply brief of petitioner filed.
11	Dec 27 1995		REDISTRIBUTED. January 12, 1996 (Page 1)
13	Jan 12 1996		Motion of respondent Charles Wesley Arlt, Sr. for leave to proceed in forma pauperis GRANTED.
14	Jan 12 1996		Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 23, 1996. The briefs of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 22, 1996. A reply brief, if any, is to be filed pursuant to Rule 25.3. Rule 29.2 does not apply. **********
15	Feb 16 1996		SET FOR ARGUMENT WEDNESDAY, APRIL 17, 1996. (1ST CASE).
16	Feb 21 1996		APPLICATION (A95-693) of the Solicitor General to file a brief in excess of the page limits granted by Justice Stevens. The brief may not exceed 60 pages.
17	Feb 23 1996		Joint appendix filed. VIDED.
18	Feb 23 1996		Brief of petitioner United States filed. VIDED.
19	Feb 23 1996	G	Motion of Advocates for Highway and Auto Safety, et al. for leave to file a brief as amici curiae filed.
20	Feb 23 1996	G	Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as amici curiae filed.
21	Feb 23 1996		Brief amici curiae of Connecticut, et al. filed. VIDED.
22	Feb 23 1996		Brief amicus curiae of Thirty-Nine Counties of the State of Washington filed. VIDED.
23	Feb 23 1996		Brief amici curiae of Counties of San Bernardino, et al. filed.
25	Feb 23 1996		Brief amici curiae of Cook County State's Attorney's Office,

2pp

No. 95-346-CFX

Entry	Date	Note	Proceedings and Orders
			et al. filed. VIDED.
26	Mar 4 1996		Motion of Advocates for Highway and Auto Safety, et al. for leave to file a brief as amici curiae GRANTED.
27	Mar 4 1996		Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as amici curiae GRANTED.
28	Mar 8 1996	G	Motion of respondents for divided argument and for additional time for oral argument filed.
29	Mar 8 1996		CIRCULATED.
31	Mar 22 1996	X	Brief amicus curiae of American Civil Liberties Union filed. VIDED.
32	Mar 22 1996	X	Brief of respondent Guy Jerome Ursery filed. VIDED.
33	Mar 22 1996	X	Brief of respondents Charles Wesley Arlt and Charles Wren filed.
30	Mar 25 1996		Motion of respondents for divided argument and for additional time for oral argument GRANTED. Twenty additional minutes are allotted for this purpose. to be divided as follows: 40 minutes - Solicitor General; 20 minutes - respondent Ursery; 20 minutes - respondents $405,089.23, et al.
34	Mar 27 1996	G	Motion of National Association of Criminal Defense Lawyers for leave to file a brief as amicus curiae filed.
35	Apr 1 1996		Record filed.
		*	Original record proceedings U.S.Court of Appeals, Ninth Circuit and U.S.District Court,Central Dist. Calif.(BOX)
36	Apr 8 1996	G	Motion of respondent James Wren for leave to proceed further herein in forma pauperis filed.
37	Apr 10 1996	X	Reply brief of petitioner filed. VIDED.
38	Apr 15 1996		Motion of respondent James Wren for leave to proceed further herein in forma pauperis GRANTED.
39	Apr 17 1996		ARGUED.
40	Apr 22 1996		Motion of National Association of Criminal Defense Lawyers for leave to file a brief as amicus curiae GRANTED.

Supreme Court, U.S.
FILED
AUG 28 1995
OFFICE OF THE CLERK

No. 95-346

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment prohibits a civil proceeding for the *in rem* forfeiture of property alleged to be the proceeds of narcotics and money laundering activities where the owners of the property were also prosecuted for, and convicted of, narcotics and money laundering crimes.

PARTIES TO THE PROCEEDINGS

The petitioner is the United States of America. The respondents are Charles Wesley Arlt, James Wren, Payback Mines, and the property listed in the caption to the final judgment of forfeiture, App., *infra*, 75a-77a.

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No.

UNITED STATES OF AMERICA, PETITIONER

v.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 33 F.3d 1210. An order amending the opinion of the court of appeals (App., *infra*, 24a-29a) is reported at 56 F.3d 41, together with a dissent from the denial of rehearing en banc.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1994. A petition for rehearing was denied, and the opinion amended, on May 30, 1995.

App., *infra*, 24a-29a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." The provisions of 21 U.S.C. 841, 846 and 881 and 18 U.S.C. 371, 981 and 1956 are reproduced at App., *infra*, 112a-156a.

STATEMENT

1. On June 17, 1991, the government filed a civil complaint, pursuant to 21 U.S.C. 881(a)(6) and 18 U.S.C. 981(a)(1)(A), seeking forfeiture of bank account funds, cars, vessels, silver bars, and aircraft claimed by James Wren, Charles Arlt, and Payback Mines. That complaint was filed five days after Wren, Arlt, and others were charged in a superseding indictment with narcotics trafficking and money laundering, in violation of 21 U.S.C. 841, 846 and 18 U.S.C. 371 and 1956. Wren, Arlt, and Payback Mines filed claims to the property in the civil proceeding. By agreement of the parties, litigation of the forfeiture action was deferred during the pendency of the criminal prosecution. App., *infra*, 50a-52a.

On March 27, 1992, Wren and Arlt were convicted of conspiracy and substantive charges relating to methamphetamine manufacturing and of laundering drug proceeds through front corporations that included Payback Mines. The government then filed a motion for summary judgment in the civil forfeiture action, contending that the assets it sought to forfeit were the proceeds of illegal narcotics activity, under 21 U.S.C. 881(a)(6), and alternatively were "involved in," or "traceable to" properties involved in, money laundering activity, under 18 U.S.C. 981(a)(1)(A). The court granted the government's motion, finding all of the assets forfeitable under the proceeds theory and, alternatively, except for the silver bars, under the money laundering theory. App., *infra*, 53a-74a.

2. A panel of the Ninth Circuit reversed, holding that the forfeiture action was barred by Arlt's and Wren's criminal convictions, because forfeiture of the property violated the Double Jeopardy Clause's prohibition on imposing cumulative punishment for the same offense in two separate proceedings. App., *infra*, 1a-23a.[1] The panel first held that a criminal prosecution and a related, parallel civil forfeiture action constitute "separate" proceedings for double jeopardy

[1] The panel noted that the claimants failed to raise any double jeopardy defense in the district court, but excused their waiver because the government responded to the claim on the merits and because the claimants relied principally on this Court's intervening decision in *Austin* v. *United States*, 113 S. Ct. 2801 (1993). App., *infra*, 5a n.1. The panel did not consider it significant, in concluding that the government effectively waived the claimants' waiver, that the double jeopardy claim was presented in less than two pages of the claimants' *pro se* brief or that the government did not have an opportunity to speak to the question of waiver at oral argument, in light of the panel's unanimous conclusion that the case was unworthy of argument. *Id.* at 1a n.*. In addition, the panel did not explain why it sustained the double jeopardy plea of Payback Mines, a claimant that was not criminally prosecuted. Those fact-bound rulings do not warrant the Court's attention, and for that reason we do not independently present them as grounds for review.

purposes. *Id.* at 7a. That conclusion, the panel believed, was required by *Jeffers* v. *United States*, 432 U.S. 137 (1977), in which eight members of this Court assumed that two parallel criminal prosecutions can never be the "same proceeding" for double jeopardy purposes. App., *infra*, 10a-12a. The panel expressly rejected (*id.* at 7a-8a) the contrary conclusions of the Second and Eleventh Circuits, which have held that parallel civil and criminal cases can qualify as a single "proceeding" under the Double Jeopardy Clause. See *United States* v. *One Single Family Residence*, 13 F.3d 1493 (11th Cir. 1994); *United States* v. *Millan*, 2 F.3d 17 (2d Cir. 1993), cert. denied, 114 S. Ct. 922 (1994).

The panel next concluded that all actions brought under the federal civil forfeiture statutes impose "punishment" for double jeopardy purposes. The panel acknowledged that in *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984), this Court unanimously held that nothing in the Double Jeopardy Clause precluded the government from obtaining a civil forfeiture of firearms following a criminal prosecution of the owner for unlawfully dealing in the same firearms, because the civil forfeiture was "remedial." App., *infra*, 13a. The panel concluded, however, that this Court "changed its collective mind" (*ibid.*) five years later in a second unanimous decision, *United States* v. *Halper*, 490 U.S. 435 (1989), by holding that certain civil proceedings can impose "punishment" for double jeopardy purposes. That "change[] [of] * * * mind" (App., *infra*, 13a) was confirmed, in the panel's view, by *Austin* v. *United States*, 113 S. Ct. 2801 (1993), which held that civil forfeiture of property used to

further drug trafficking should be considered "punishment" for purposes of determining the threshold applicability of the Eighth Amendment's prohibition of excessive fines.

According to the panel, "the only fair reading" of *Austin* (App., *infra*, 15a) is that all civil forfeitures must be deemed "punishment," not only under the Eighth Amendment, but also under the Double Jeopardy Clause. Moreover, the panel concluded that *Austin* reflects a departure from *Halper*'s case-by-case treatment of "punishment" determinations, and instead adopted "a categorical approach" (App., *infra*, 17a) that looks "to the requirements of the forfeiture *statute* as a whole" (*ibid.*), rather than to the facts of the particular forfeiture. Applying that "categorical" analysis, the panel concluded that the statutory provisions governing forfeitures of drug proceeds impose "punishment" in all of their applications. The panel acknowledged (*id.* at 16a) that its conclusion that the forfeiture of drug proceeds is always punitive conflicts with *United States* v. *Tilley*, 18 F.3d 295 (5th Cir.), cert. denied, 115 S. Ct. 573, 574 (1994). Having concluded that the forfeiture action in this case imposed a second "punishment" in a separate proceeding, the panel reversed and remanded with instructions to dismiss the forfeiture action with prejudice.[2]

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[2] On December 1, 1994, the same panel of the Ninth Circuit reversed Arlt's conviction on the ground that he was improperly denied his right to self-representation, and remanded for a new trial. See *United States* v. *Arlt*, 41 F.3d 516. That decision did not affect Wren's conviction, the only other claimant who was criminally prosecuted. Wren's conviction was affirmed by the same panel in an unpublished order, but

3. The United States sought rehearing, and suggested rehearing en banc, contending that (1) the civil forfeiture of drug proceeds cannot be "punishment" for an "offense" within the meaning of the Double Jeopardy Clause, (2) if civil forfeiture is punishment for an "offense" for double jeopardy purposes, the "elements" test of *Blockburger* v. *United States*, 284 U.S. 299 (1932), requires the conclusion that it is not the "same" offense as the crimes for which the claimants were convicted, and (3) if the civil forfeiture is deemed to impose punishment for the same offense as the crimes for which the claimants were also punished, all punishment occurred in the "same proceeding" for double jeopardy purposes. The court requested responses to the petition, and accepted a brief in opposition to rehearing from the National Association of Criminal Defense Lawyers as *amicus curiae*.

After considering those submissions, the court denied rehearing and rehearing en banc. The panel, however, amended its opinion to note (App., *infra*, 25a) that its categorical approach was also "compelled" by *Department of Revenue of Montana* v. *Kurth Ranch*, 114 S. Ct. 1937 (1994), a case decided before the panel's decision, but not cited in its original opinion. The panel explained that *Kurth Ranch* "applied *Austin*'s categorical approach for determining when punishment has been imposed in a Double Jeopardy case arising pursuant to a statute that taxed drug monies." App., *infra*, 25a.

(on the government's cross-appeal) the panel vacated his sentence and remanded for resentencing. See *United States* v. *Wren*, No. 92-50467 (Dec. 1, 1994). Following the remand of Arlt's case, the government obtained a superseding indictment (against Arlt alone) naming the subject property in a new *in personam* forfeiture count, which will be tried with the other offenses for which Arlt has been ordered to stand trial. We do not believe the subsequent developments as to either Wren or Arlt affect the suitability of this case for further review. In the event forfeiture is ordered as a result of Arlt's new trial, it is doubtful, in light of the decision below, that such forfeiture could bind any other claimants. Cf. *Witte* v. *United States*, 115 S. Ct. 2199, 2204-2205 (1995).

Seven judges dissented from the denial of rehearing en banc. Writing for the seven dissenters, Judge Rymer stated that, by leaving the decision below unreviewed, the Ninth Circuit "let[] stand a decision that 'could free hundreds of drug dealers across the western United States,'" App., *infra*, 26a, since "[t]he flip side of the panel's reasoning is that a drug dealer whose illegally obtained proceeds have previously been seized may not thereafter be prosecuted because he will already have been 'punished.' This cannot be right." *Ibid.*

Judge Rymer argued that "[p]roceeds are the functional equivalent of contraband," the forfeiture of which "is a remedial sanction that does not constitute punishment for double jeopardy purposes" under *89 Firearms*. App., *infra*, 27a. She noted that "the panel's opinion writes *89 Firearms* off the books" by citing *Halper* and *Austin* "out of context and surmising that 'the Court changed its collective mind' * * * despite the fact that the Court itself didn't say that it had." *Ibid.* She also rejected the panel's view that *Kurth Ranch* should be read to support a "categorical" approach to the forfeiture of proceeds, noting that "*Kurth Ranch* was a double jeopardy case * * * that was decided after *Austin*, yet mentioned *Austin* only in passing and then only

as holding that a civil forfeiture may violate the Eighth Amendment's proscription against excessive fines." *Id.* at 29a n.3 (citing *Kurth Ranch*, 114 S. Ct. at 1945). Judge Rymer concluded that "[*i*]*f* the Supreme Court *has* changed its mind—if * * * separating a drug trafficker from the proceeds of his trafficking is *punishment* which either bars forfeiture after conviction or prosecution after seizure—it is up to that Court to say so." App., *infra*, 28a.

REASONS FOR GRANTING THE PETITION

This case presents three related and important issues under the Double Jeopardy Clause. First, the Ninth Circuit has erroneously held that *Halper*, *Austin*, and *Kurth Ranch* effectively overturned the settled understanding, unanimously reaffirmed by this Court a decade ago in *89 Firearms*, that a civil forfeiture action that serves a remedial purpose may follow a criminal prosecution for related conduct without offending the Double Jeopardy Clause. Second, the Ninth Circuit's holding that the civil forfeiture and criminal convictions inflicted punishment for "the same offense" cannot be reconciled with numerous decisions of this Court holding that whether two offenses are the "same" for double jeopardy purposes generally is governed by the "elements" test of *Blockburger*. Third, the Ninth Circuit erred in holding that parallel civil and criminal cases, if they are deemed to impose punishment for the same offenses, necessarily are "separate proceedings" for double jeopardy purposes. Those rulings, which the Ninth Circuit conceded are at odds with the conclusions of other courts of appeals, seriously threaten the ability of federal and state authorities to prosecute crimes and administer important civil forfeiture programs

within their respective jurisdictions. Further review is therefore warranted.

1. In *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984), this Court held that the Double Jeopardy Clause did not bar a civil *in rem* action to forfeit firearms "involved in or used or intended to be used in" violations of the Gun Control Act of 1968 following the owner's acquittal of related violations of that Act. 465 U.S. at 362-366. The Court concluded that, "[u]nless the forfeiture sanction was intended as punishment, so that the proceeding is essentially criminal in character, the Double Jeopardy Clause is not applicable." *Id.* at 362. The Court noted that Congress intended the forfeiture to be a civil remedy, that the forfeiture furthered the "broad remedial aims" of "discouraging unregulated commerce in firearms and * * * removing from circulation firearms that have been used or intended for use outside of regulated channels of commerce," and that accordingly the forfeiture served goals "plainly more remedial than punitive." *Id.* at 364. Because the claimant "failed to establish by the 'clearest proof' " that the forfeiture was in fact sufficiently punitive, the Court concluded that it was "not an additional penalty for the commission of a criminal act, but rather is a separate civil sanction, remedial in nature * * * [that was] not barred by the Double Jeopardy Clause." *Id.* at 366. See also *Various Items of Personal Property* v. *United States*, 282 U.S. 577, 581 (1931) ("The forfeiture is no part of the punishment for the criminal offense. The provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply") (citation omitted).

The Ninth Circuit concluded that *89 Firearms* has effectively been written "off the books," App., *infra*, 27a (Rymer, J., dissenting from the denial of rehearing en banc), by this Court's decisions in *United States* v. *Halper*, 490 U.S. 435 (1989), *Austin* v. *United States*, 113 S. Ct. 2801 (1993), and *Department of Revenue of Montana* v. *Kurth Ranch*, 114 S. Ct. 1937 (1994). None of those cases purported to overrule *89 Firearms*, and none can be read to require the conclusion that the forfeiture of drug proceeds is inherently "punishment" for an "offense" under the Double Jeopardy Clause.

In *Halper*, the Court stated a rule for "the rare case" in which "a prolific but small-gauge offender [was subjected] to a sanction overwhelmingly disproportionate to the damages he has caused," so that the sanction though properly viewed as remedial in most of its applications could not so be viewed in the specific case. 490 U.S. at 449.[8] That ruling lends no support to the Ninth Circuit's conclusion that a civil forfeiture of the proceeds of drug activity—*i.e.*, the seizure of the ill-gotten profits from narcotics trafficking—must *always* be characterized as punitive. To the contrary, as the Fifth Circuit concluded in *United States* v. *Tilley*, 18 F.3d 295, cert. denied, 115 S. Ct. 573, 574 (1994), a case "with which [the opinion below is] squarely in conflict," App, *infra*, 28a (Rymer, J., dissenting from the denial of rehearing en banc), the forfeiture of drug proceeds is akin to the forfeiture of contraband or other illegal items; that action is thus clearly remedial:

> The possessor of proceeds from illegal drug sales never invested honest labor or other lawfully derived property to obtain the subsequently forfeited proceeds. Consequently, he has no reasonable expectation that the law will protect, condone, or even allow, his continued possession of such proceeds because they have their very genesis in illegal activity. * * * [T]he forfeiture of illegal proceeds, much like the confiscation of stolen money from a bank robber, merely places that party in the lawfully protected financial status quo that he enjoyed prior to launching his illegal scheme. This is not punishment "within the plain meaning of the word."

18 F.3d at 300 (quoting *Halper*, 490 U.S. at 449). Accord *SEC* v. *Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994) (disgorgement order following criminal conviction for violation of securities laws not a punishment but remedial only, as it requires defendant to give up only his ill-gotten gains and does not impose an additional penalty, citing *Tilley*); *United States* v. *Carson*, 52 F.3d 1173, 1182-1183 (2d Cir. 1995) (disgorgement order in civil RICO case not "punishment" for double jeopardy purposes, because "[d]isgorgement, by design, is compensatory").

Nothing in *Austin* changes that conclusion. In finding that the civil forfeiture provisions at issue in that case (21 U.S.C. 881(a)(4) and (7)) constituted punishment for purposes of the threshold applicability of the Eighth Amendment's Excessive Fines Clause, the Court distinguished two of its precedents concerning the forfeiture of contraband or

[8] *Halper* therefore stands for the proposition that, in "rare" cases, a person who has previously been convicted of a crime may oppose a civil remedy, otherwise permissible under the Double Jeopardy Clause, if the penalty sought is so vastly disproportionate to the harm caused by the defendant that, as applied to him, it cannot be explained other than as additional punishment for the crime.

goods involved in customs violations and noted that the forfeitures in both of those cases were remedial. 113 S. Ct. at 2811-2812 (citing *89 Firearms*, 465 U.S. at 364, and *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237 (1972) (per curiam) (forfeiture of undeclared imported merchandise prevents forbidden merchandise from circulating in the United States, and provides a reasonable form of liquidated damages)). The Court also cited the same cases in observing that "[t]he Double Jeopardy Clause has been held not to apply in civil forfeiture proceedings, but only in cases where the forfeiture could properly be characterized as remedial." *Austin*, 113 S. Ct. at 2805 n.4. This Court's action in citing and distinguishing those cases scarcely supports the Ninth Circuit's view that this Court has "changed its collective mind" (App., *infra*, 13a) about their continuing vitality.

Nor is the forfeiture of drug proceeds similar to the tax on possession of dangerous drugs, which the Court found was a punishment for double jeopardy purposes in *Kurth Ranch*, *supra*. The Court found it highly significant that the state statute that required payment of the tax conditioned liability on commission of a crime, and that the tax was due and collectable "only after the taxpayer ha[d] been arrested for the precise conduct that gives rise to the tax obligation in the first place." 114 S. Ct. at 1947. As the Court noted, "[p]ersons who ha[d] been arrested for possessing marijuana constitute[d] the entire class of taxpayers subject to the [state] tax." *Ibid.* In addition, the tax was an *in personam* sanction that was exacted after the drugs had been confiscated and destroyed, and that amounted to more than eight times the market value of the drugs. As

the Court put it, "[a] tax on 'possession' of goods that no longer exist and that the taxpayer never lawfully possessed has an unmistakable punitive character" especially when it is "imposed on criminals and no others." *Id.* at 1948. That type of assessment went far beyond merely stripping a wrongdoer of the profits of his trade, and bears no resemblance to the forfeitures that the Ninth Circuit categorically held to constitute "punishment" for an "offense" in this case.

As the dissenters below noted (App., *infra*, 27a), some statements in *Halper*, *Austin*, and *Kurth Ranch*, if read 'out of context,'" might lend support to the Ninth Circuit's decision in this case. Whether those cases should be read to change established double jeopardy doctrine has created considerable confusion and has led to a conflict in the lower courts. See, *e.g.*, *United States* v. *Morgan*, 51 F.3d 1105, 1113 (2d Cir. 1995) (noting proliferation of double jeopardy claims in various contexts following *Halper* and Second Circuit's conclusion that an *in rem* civil forfeiture is not "punishment" for double jeopardy purposes, but acknowledging the Ninth Circuit's decision in this case as contrary authority), petition for cert. pending, No. 95-14 (July 3, 1995). The Sixth Circuit has recently agreed with the Ninth Circuit's analysis in a case involving the forfeiture of property that facilitated or was intended to facilitate drug trafficking. See *United States* v. *Ursery*, No. 94-1127 (July 13, 1995), petition for cert. pending, No. 95-—— (Aug. 28, 1995). On the other hand, as we have noted, the Fifth Circuit in *Tilley*, *supra*, reached a conclusion contrary to the Ninth Circuit's holding in this case in an indistinguishable factual context. The D.C. Circuit followed the Fifth Circuit's decision in the analogous context of civil disgorgement proceed-

ings in *Bilzerian*, *supra*. See also *Carson*, 52 F.3d at 1182-1183. The Ninth Circuit's conclusion that the civil forfeiture of proceeds of drug trafficking is always punitive for double jeopardy purposes is also inconsistent with *United States* v. *Borromeo*, 995 F.2d 23, amended on reh'g, 1 F.3d 219 (4th Cir. 1993), where the court ordered an asset-by-asset review to ascertain whether forfeiture of the proceeds would be punitive.[4] The courts of appeals' disarray on an issue of such widespread application warrants this Court's attention.

2. As this Court's cases recognize, the component of the Double Jeopardy Clause on which the Ninth Circuit relied does not prohibit the imposition of punishment (or multiple punishments) *simpliciter*, but

[4] The Ninth Circuit distinguished *Borromeo* by stating that it predated, and did "not survive," *Austin*. App., *infra*, 16a n.9. The Ninth Circuit overlooked, however, the fact that the Fourth Circuit granted rehearing in *Borromeo* following this Court's decision in *Austin*. 1 F.3d 219 (1993). Far from reading *Austin* to require a "categorical" conclusion that all forfeitures of drug proceeds are punishment, the Fourth Circuit appeared to assume that the only issue as to punishment that possibly can arise in a proceeds case relates, not to the ill-gotten gains themselves, but to property derived from those gains through the (presumably lawful) labors of the claimant. Even in that context, the Fourth Circuit noted, "[i]t is arguable that there is little justification for the position that one who successfully parlays his tainted dollar into a fortune should be permitted to enjoy a windfall." *Id.* at 221. The court was unwilling, however, to say that such a forfeiture can never be punitive, since the ratio of the value of the proceeds to the harm caused by the claimant's conduct "may, *in a given case*, be relevant under * * * *Austin*." *Ibid.* (emphasis added). Accordingly, it remanded to the district court to make "a proportionality determination with regard to each and all items of the property which the government seeks to forfeit." *Ibid.*

only the imposition of "multiple punishments *for the same offense*." *Halper*, 490 U.S. at 440 (emphasis added); *Kurth Ranch*, 114 S. Ct. at 1945 ("A defendant convicted and punished for an offense may not have a nonremedial civil penalty imposed against him *for the same offense* in a separate proceeding") (emphasis added). Quite apart from the Ninth Circuit's error in concluding that a civil forfeiture of drug proceeds is inherently punitive, the court also erred in finding that the forfeiture "offense" was the "same" as the crimes for which the claimants were punished.

Whether two offenses are the "same" for double jeopardy purposes does not turn on whether the same illegal conduct was involved in both, but on a comparison of the elements that the government is required to prove to prevail under each; the offenses are different if each requires proof of a fact that the other does not. See *Blockburger* v. *United States*, 284 U.S. 299 (1932); see also *Witte* v. *United States*, 115 S. Ct. 2199, 2204 (1995) (noting that *Blockburger* analysis applies to "multiple punishment" claims); *United States* v. *Dixon*, 113 S. Ct. 2849 (1993) (overruling *Grady* v. *Corbin*, 495 U.S. 508 (1990)). The Ninth Circuit has interpreted the decision below to require the conclusion that forfeitures of instrumentalities or proceeds of drug trafficking are "a species of greater offenses with respect to the lesser-included [criminal] offenses," because the forfeiture statutes "incorporate the elements of [the] criminal offenses." *United States* v. *One 1978 Piper Cherokee Aircraft*, 37 F.3d 489, 495 (1994).[5] The

[5] While our petition for rehearing and suggestion for rehearing en banc were pending in the instant case, we also sought rehearing in *One 1978 Piper Cherokee Aircraft*. On

Sixth Circuit recently reached the same conclusion. See *Ursery*, No. 94-1127, slip op. 10-11.

The conclusions reached by the Ninth and Sixth Circuits depart from the consistent course of decisions of this Court applying the *Blockburger* rule. An offense is "included" within another under the *Blockburger* rule only if every conceivable application of the "greater" offense "necessarily" establishes the existence of the "included" offense. See, *e.g.*, *United States* v. *Woodward*, 469 U.S. 105, 108 & n.4 (1985) (per curiam); *Brown* v. *Ohio*, 432 U.S. 161, 168 (1977) (offense is lesser-included under *Blockburger* if it is "invariably true" that the lesser offense "requires no proof beyond that which is required for conviction of the greater"); accord *Schmuck* v. *United States*, 489 U.S. 705, 716 (1989) (adopting "elements" test for determining whether offense is "lesser included" under Fed. R. Crim. P. 31(c); offense is not lesser-included "unless the elements of the lesser offense are a subset of the elements of the charged offense"); *id.* at 719 ("the lesser offense must not only be part of the greater in fact, but it must be embraced within the legal definition of the greater as part thereof").

The forfeiture "offenses" cannot be deemed the "same" as the claimants' criminal offenses under the traditional understanding of *Blockburger*. The forfeiture statute contains at least one element that is not part of the criminal offenses, to wit, the existence

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June 29, 1995, the Ninth Circuit, acting *sua sponte*, stayed action on that rehearing petition pending the filing, and final disposition by this Court, of any petition by the United States for a writ of certiorari to review the decision in this case.

of property derived from, or used in, criminal activities. Indeed, forfeiture may be had under 21 U.S.C. 881(a)(6) if the property was "intended" for use, by anyone, in the commission of narcotics crimes, even if no such crime was actually committed. Cf. *89 Firearms*, 465 U.S. at 363-364.

Moreover, each of the crimes committed by the claimants—conspiracy and possession of a controlled substance with intent to distribute it and money laundering—requires proof of a certain criminal mental state that the government need not prove, with respect to the claimant-owner, in establishing the forfeiture offense. Indeed, the forfeiture statute does not require that the claimant-owner have committed any criminal offense at all. It is sufficient that the property in question was derived from or used in the criminal activities of *anyone*. See, *e.g.*, *Austin*, 113 S. Ct. at 2810 n.11 (noting that forfeiture of property may be punitive as to the owner even though the forfeiture may be had for "acts of a person other than the owner"); *Origet* v. *United States*, 125 U.S. 240, 246 (1888) ("The person punished for the [criminal] offense may be an entirely different person from the owner of the merchandise, or any person interested in it"); *United States* v. *Chandler*, 36 F.3d 358 (4th Cir. 1994) ("It is not an element of the government's case to prove the involvement of the property's owner in the commission of the offense giving rise to the forfeiture"), cert. denied, 115 S. Ct. 1792 (1995). In those circumstances, the Ninth Circuit's view that the narcotics and money laundering crimes are necessarily "included" within the forfeiture "offenses" constitutes a significant departure from the controlling decisions of this Court. That departure warrants this Court's review.

3. Even if the forfeitures in this case constituted "punishment" for the same offenses for which claimants were convicted, the "Double Jeopardy Clause simply is not implicated" if the criminal action was part of the same "proceeding" as the forfeiture action, because in a single proceeding "the multiple-punishment issue would be limited to ensuring that the total punishment did not exceed that authorized by the legislature." *Halper*, 490 U.S. at 450; see also *Missouri* v. *Hunter*, 459 U.S. 359 (1983). The Ninth Circuit concluded that the civil forfeitures and criminal convictions must be deemed to have resulted from "separate" proceedings because two criminal cases that are separately tried are ordinarily considered "separate" for double jeopardy purposes. App., *infra*, 10a (citing *Jeffers* v. *United States*, 432 U.S. 137 (1977)). The Ninth Circuit erred in reaching that conclusion.

This Court recognized in *Halper*, 490 U.S. at 450, that nothing in that decision would "prevent the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding." Because civil and criminal actions cannot be joined in a single trial—and never have been joined under our system of justice—*Halper* implies that inquiry into whether those actions constitute the "same proceeding" for double jeopardy purposes cannot turn solely on our traditional treatment of formally "separate" *criminal* cases, which *can* be joined in a single trial. See *United States* v. *Millan*, 2 F.3d 17, 20 (2d Cir. 1993), cert. denied, 114 S. Ct. 922 (1994). Indeed, even in the context of purely criminal proceedings, it is not invariably true that formally separate criminal trials involving the same offense amount to

"separate" proceedings that trigger double jeopardy protections. See, *e.g.*, *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294, 309 (1984) (two-tier state system, even if "technically" resulting in two trials, "can be regarded as * * * a single, continuous course of judicial proceedings" that does not implicate the concerns of the Double Jeopardy Clause).

The relevant question must instead be whether the maintenance of parallel civil forfeiture and criminal actions "constitute[s] 'governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect.' " *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. at 310 (quoting *United States* v. *Scott*, 437 U.S. 82, 91 (1978)). As the Ninth Circuit acknowledged, App., *infra*, 7a-8a, the Second and Eleventh Circuits have answered that question in the negative. See, *e.g.*, *Millan*, 2 F.3d at 20; *United States* v. *One Single Family Residence*, 13 F.3d 1493, 1499 (11th Cir. 1994). Those circuits have recognized that the simultaneous pursuit of civil and criminal actions does not implicate the concern that the government "is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding." *Halper*, 490 U.S. at 451 n.10. The Ninth Circuit's disagreement with the conclusions of two other circuits warrants this Court's review.

4. The decision in this case has significant ramifications. In civil cases, the decision has created grave uncertainty about the extent to which the government may seek *in rem* forfeiture when a potential claimant has previously been prosecuted criminally. The result has been to chill the efficient administration of the important federal asset-forfeiture program.

In criminal cases, as Judge Rymer's dissent predicted in describing the "flip side of the panel's reasoning," App., *infra*, 26a, the decision below has given rise to a large number of motions to dismiss based on the prior institution of civil forfeiture proceedings by the government. The Ninth Circuit has held that criminal defendants have a right to an interlocutory appeal under *Abney* v. *United States*, 431 U.S. 651 (1977), when the district court does not sustain the plea of double jeopardy. See *United States* v. *Chick*, No. 94-30395 (July 14, 1995), slip op. 8427, 8431-8435; accord *Morgan*, 51 F.3d at 1109-1110. Thus, criminal trials cannot proceed in the Ninth Circuit until defendants obtain appellate rulings on their double jeopardy claims. Numerous interlocutory appeals by criminal defendants, and by the government in cases in which the indictment has been dismissed in reliance on the decision below, are currently pending before the Ninth Circuit.[6] Even in

[6] More than a hundred appeals addressing the validity of indictments or criminal convictions and premised on the panel's analysis in this case have been filed and/or decided since the date of that decision in the Ninth Circuit alone. See, *e.g.*, *McBroom* v. *United States*, No. 95-10088; *Oakes* v. *United States*, No. 94-36248; *Orallo* v. *United States*, No. 95-16223; *Quigley* v. *United States*, No. 95-10089; *Ringor* v. *United States*, No. 95-16042; *Melvin Robinson* v. *United States*, No. 95-10087; *Patricia Robinson* v. *United States*, No. 95-10099; *United States* v. *Ailemen*, Nos. 95-10233 & 95-10244; *United States* v. *Aldridge*, No. 95-10219; *United States* v. *Amaya*, No. 95-30064; *United States* v. *Ayanleye*, Nos. 95-10226 & 95-10279; *United States* v. *Backues*, No. 95-16301; *United States* v. *Bailey*, No. 95-10023; *United States* v. *Barton*, 46 F.3d 51 (9th Cir. 1995); *United States* v. *Blair*, No. 95-35468; *United States* v. *Boyd*, No. 94-30450; *United States* v. *Branum*, No. 95-30045; *United States* v. *Bravo*, No. 95-

cases where the government ultimately prevails on appeal, the decision below will result in substantial

15842; *United States* v. *Brown*, No. 94-30271; *United States* v. *Cain*, No. 95-35270; *United States* v. *Carpa*, No. 95-10258; *United States* v. *Chick*, No. 94-30395; *United States* v. *Cole*, No. 95-35358; *United States* v. *Connell*, No. 94-10426; *United States* v. *Cretacci*, No. 94-10235; *United States* v. *Day*, No. 95-35741; *United States* v. *Domitrovich*, No. 95-35680; *United States* v. *D'Uva*, No. 95-50167; *United States* v. *Elliott*, No. 94-30152; *United States* v. *Escobedo*, No. 95-30229; *United States* v. *Espinoza*, No. 95-55647; *United States* v. *Estis*, No. 95-50089; *United States* v. *Faber*, No. 94-30228; *United States* v. *Flowers*, No. 95-10337; *United States* v. *Fontaine*, No. 95-50213; *United States* v. *Frasquillo*, No. 94-10444; *United States* v. *Gartner*, No. 95-50072; *United States* v. *Good*, No. 95-30102; *United States* v. *Griffis*, No. 95-10292; *United States* v. *Harrison*, No. 95-35211; *United States* v. *Hepler*, No. 95-35495; *United States* v. *Hill*, No. 95-35381; *United States* v. *Hollingsworth*, No. 95-30228; *United States* v. *Housely*, Nos. 95-10126 & 94-10523; *United States* v. *Ingraham*, No. 93-30307; *United States* v. *Inocencio*, No. 95-10021; *United States* v. *Mir*, No. 95-10094; *United States* v. *Jain*, No. 95-35625; *United States* v. *Jordan*, No. 95-35520; *United States* v. *Kearns*, No. 94-10373; *United States* v. *Kemmish*, No. 94-50621; *United States* v. *Leonis*, No. 94-10522; *United States* v. *Lester*, Nos. 95-10301 & 95-16414; *United States* v. *Mack*, No. 95-35125; *United States* v. *Manarite*, Nos. 95-70561 & 95-70562; *United States* v. *Mancuso*, No. 95-10294; *United States* v. *Martin*, No. 95-35554; *United States* v. *Mathisen*, No. 95-35756; *United States* v. *McClinton*, No. 95-30148; *United States* v. *McKenna*, No. 93-30315; *United States* v. *Mejia-Mesa*, No. 95-35429; *United States* v. *Meola*, No. 95-35556; *United States* v. *Montalvo*, No. 94-10110; *United States* v. *Mosley*, No. 95-16512; *United States* v. *Muth*, No. 95-35783; *United States* v. *Nakamoto*, No. 95-10091; *United States* v. *Nussbaumer*, No. 95-35719; *United States* v. *Ortiz-Sanchez*, No. 94-30276; *United States* v. *Palacios-Amaya*, No. 95-30064; *United States* v. *Pearson*, No. 95-35636; *United States* v. *Plunk*, Nos. 94-30421 &

delays in the adjudication of defendants' guilt, potentially prejudicing the government's ability to prove its case. In cases where the government does not prevail on appeal, the decision below will result in the unwarranted termination of criminal prosecutions.

The decision below has also formed the basis for a large number of post-conviction challenges under 28 U.S.C. 2255 from defendants claiming that their criminal prosecutions in the Ninth Circuit imper-

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94-30422; *United States* v. *Potts*, No. 94-35924; *United States* v. *Pruitt*, Nos. 94-50659, 94-50660; *United States* v. *Putchongkarrat*, No. 95-50005; *United States* v. *Ramirez*, No. 95-10235; *United States* v. *Ramos-Oseguera*, No. 95-10236; *United States* v. *Renteria*, No. 94-56034; *United States* v. *Reynolds*, No. 94-50390; *United States* v. *Roberts*, No. 95-15891; *United States* v. *Ross*, No. 95-15912; *United States* v. *Saglam*, No. 95-50284; *United States* v. *Sailele*, No. 95-10306; *United States* v. *Sanders*, No. 95-30169; *United States* v. *Sandoval*, No. 95-35360; *United States* v. *Schubert*, No. 95-15836; *United States* v. *Sheridan*, No. 95-55841; *United States* v. *Sherrett*, C.A. No. 95-30059; *United States* v. *Shomorin*, No. 95-10227; *United States* v. *Shorb*, Nos. 93-30449 & 93-30450; *United States* v. *Singleton*, No. 95-16395; *United States* v. *Smith*, No. 95-35542; *United States* v. *Stanwood*, No. 95-35158; *United States* v. *Sterling*, No. 95-35152; *United States* v. *Mark Thomas Taggatz*, No. 95-50169; *United States* v. *Tamez*, No. 95-35354; *United States* v. *Trujillo*, No. 95-35306; *United States* v. *Vega*, No. 94-10521; *United States* v. *Vominh*, C.A. No. 95-30107; *United States* v. *Vominh (Tan)*, No. 95-30057; *United States* v. *Vominh (Thanh Hai)*, No. 95-30060; *United States* v. *Walsh*, No. 95-10159; *United States* v. *Washington*, No. 95-50076; *United States* v. *Wehr*, No. 95-35553; *United States* v. *Wilhelm*, No. 95-35784; *United States* v. *Whittlesey*, No. 95-35192; *United States* v. *Wilson*, No. 95-10083; *United States* v. *Wong*, No. 94-30404; *United States* v. *Wright*, No. 95-55908; *United States* v. *Young*, No. 93-30308.

missibly followed a civil forfeiture of property that represented the proceeds of, or was otherwise involved in, their offenses.[7] Some of those challenges

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[7] In the Central District of California alone, the district where this case originated, there have been numerous challenges to final judgments of conviction based on the decision in this case. See, *e.g.*, *United States* v. *Abday*, No. CV 95-5019-JMI; *United States* v. *Aldana*, No. CV 95-3512-SVW; *United States* v. *Barnes*, No. CV 95-116-WJR; *United States* v. *Bines*, No. CV 95-957-LEW; *United States* v. *Brown*, No. CV 95-5013-WMB; *United States* v. *Brown*, No. CV 95-119-ER; *United States* v. *Butler*, No. CV 95-2779-ER; *United States* v. *Cardenas-Triana*, No. CV 95-2820-WMB; *United States* v. *Coleman*, No. CV 95-4273-SVW; *United States* v. *Comisar*, No. CV 95-3060-AWT; *United States* v. *Contreras*, No. CV 95-1402-JSL; *United States* v. *Everett*, No. CV 95-1410-ER; *United States* v. *Gentry*, No. CV 95-4002-JSL; *United States* v. *Gutierrez (Jesus Felix)*, No. CV 94-6050-ER; *United States* v. *Gutierrez (Marco Antonio)*, No. CV 95-4275-WMB; *United States* v. *Harris*, No. CV 95-2593-WJR; *United States* v. *Gomez-Hernandez*, No. CV 95-2822-JGD; *United States* v. *Hernandez*, No. CV 95-3777-JMI; *United States* v. *Ricardo Huitron*, No. CV 95-3517-DMT; *United States* v. *Gabriel Huitron*, No. CV 95-2559-DMT; *United States* v. *Huntoon*, No. CV 95-3999-WJR; *United States* v. *Hutchens*, No. CV 95-2558-WJR; *United States* v. *Kelly*, No. CV 95-1409-AAH; *United States* v. *Johnson*, No. CV 95-5002-WDK; *United States* v. *Larsen*, No. CV 95-2700-CBM; *United States* v. *Lefebvre*, No. SA CV 95-488-GLT; *United States* v. *Lingenfelter*, No. SA CV 95-500-AHS; *United States* v. *Mendoza*, No. CV 95-4280-HLH; *United States* v. *Miller*, No. CV 95-3773-SVW; *United States* v. *Montenegro*, No. CV 95-5015-WMB; *United States* v. *Morgan*, No. CV 95-4629-SVW; *United States* v. *Morgan (Lawrance)*, No. SA CV 94-1027-AHS; *United States* v. *Marolf*, No. SA CV 95-418-AHS; *United States* v. *Nassar*, No. CV 95-1367-TJH; *United States* v. *Ono*, No. CV 95-3016-AWT; *United States* v. *Parker*, No. CV 95-1241-RMT; *United States* v. *Patton*, No. CV 95-4277-WDK; *United States* v. *Pena-Urias*, No. CV 95-3627-JGD;

have been stayed pending the expiration of the time allowed for the filing of a petition for a writ of certiorari in this case (or pending the Court's action on our petition). Others continue to be litigated in district courts throughout the Ninth Circuit. Those cases have led to collateral litigation about issues of retroactivity and procedural default, which could be obviated by this Court's prompt intervention.

5. In addition to seeking review of the Ninth Circuit's decision in this case, we have also filed a petition for a writ of certiorari seeking review of the Sixth Circuit's decision in *Ursery*, *supra*. We believe that the Court should grant certiorari and give plenary consideration to both cases. While both cases present similar double jeopardy issues, those issues arise in somewhat different factual and legal contexts that may illuminate the Court's consideration of the problem. *Ursery* involves the reversal of a criminal conviction in reliance on a purportedly separate civil forfeiture proceeding. In addition, the civil forfeiture in *Ursery* did not involve property alleged to be "proceeds" of criminal activities, but property that allegedly was used to facilitate the commission of narcotics

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United States v. *Pitts*, No. CV 95-2740-ER; *United States* v. *Reaves*, No. CV 94-4042; *United States* v. *Rodriguez-Ortiz*, No. 95-5091-HLH; *United States* v. *Andrew David Rubin*, No. CV 95-108-RMT; *United States* v. *Matthew Craig Rubin*, No. CV 95-107-RMT; *United States* v. *Smith*, No. CV 95-3776-JGD; *United States* v. *Stephens*, No. CV 95-2782-DWW; *United States* v. *Tan*, No. CV 95-3774-MRP; *United States* v. *Tillman*, No. CV 95-3772-JGD; *United States* v. *Unanka*, No. CV 95-2146-AWT; *United States* v. *Wheaton*, No. SA CV 95-414-AHS; *United States* v. *Yant*, No. CV 95-2001-RSWL.

offenses. A ruling that the civil forfeiture of "proceeds" is not "punishment" would not necessarily dispose of that question with respect to facilitating property. In order to ensure that the Court will have a full opportunity to explore the issues that are dividing the lower courts, we respectfully suggest that the Court grant certiorari in both cases and consolidate them for argument.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1995

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 93-5594

D.C. No. CV 91-3264-A

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

$405,089.23 U.S. CURRENCY, ET AL., DEFENDANTS.
CHARLES ARLT; JAMES WREN; PAYBACK MINES,
CLAIMANTS-APPELLANTS.

Appeal from the United States District Court
for the Central District of California
A. Wallace Tashima, District Judge, Presiding

Submitted July 12, 1994 *
Pasadena, California

Filed September 6, 1994

Before: Cecil F. Poole and Stephen Reinhardt, Circuit Judges, and Jack E. Tanner,** District Judge.

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* The panel unanimously finds this case suitable for disposition without oral argument. Circuit Rule 34-4.

** Honorable Jack E. Tanner, Senior United States District Judge for Western District of Washington, sitting by designation.

OPINION

REINHARDT, Circuit Judge:

This case involves the constitutional limits on the government's ability to seek criminal penalties and civil forfeiture based on the same violations of law. The government brought a criminal prosecution against the claimants at approximately the same time as it instituted this separate and parallel civil forfeiture action under 18 U.S.C. § 981(a)(1)(A) and 21 U.S.C. § 881(a)(6). The question is whether the government violated the Double Jeopardy Clause of the Fifth Amendment by obtaining convictions in the criminal case and then continuing to pursue the forfeiture action. We answer the question in the affirmative and reverse the order of forfeiture.

I.

Claimants James Wren, Charles Arlt, and Payback Mines appeal pro se the forfeiture of their property following Wren and Arlt's criminal convictions of various counts of conspiracy and money laundering. In the criminal case, Arlt, Wren, and several others had been accused of conducting a large-scale methamphetamine manufacturing operation. Through a series of front corporations, including Payback Mines, the defendants had sought to create the appearance that they were engaging in legitimate gold mining activities.

The government instituted this civil forfeiture action on June 17, 1991, five days after the grand jury

issued a superseding indictment in the parallel criminal case. The forfeiture complaint listed several hundred thousand dollars' worth of property: $405,089.23 in a Security Pacific Bank account; $8,929.93 in three Bank of America accounts; $123,000 in cash and 138 silver bars seized at Mayhill Bail Bonds; one Bell 47 G-2 helicopter; one shrimp boat; a Piper 6 Cherokee airplane; and eleven automobiles and one boat purchased at an auction. The government argued that these pieces of property were connected to the offenses that were the subject of the parallel criminal case. It claimed that the property was forfeitable on two independent grounds: as proceeds of illegal narcotics transactions under 21 U.S.C. § 881(a)(6), and as property "involved in" money laundering violations under 18 U.S.C. § 981(a)(1)(A). Arlt, Wren, and Payback Mines filed claims to the res. Pursuant to a stipulation between the parties, the district court effectively stayed the civil forfeiture action pending the completion of the parallel criminal case.

The criminal case terminated on March 27, 1992, with the convictions of Arlt, Wren, and their co-defendants. Over eight months later, on December 4, the government filed a motion for summary judgment in the parallel forfeiture action. The government's motion relied on the criminal conviction, a declaration submitted by I.R.S. Special Agent Phillip Mullins, and various pieces of documentary evidence. Asserting that this evidence established probable cause and therefore shifted the burden of proof to the claimants, *see* 19 U.S.C. § 1615, the government claimed that the claimants had failed to demonstrate that the property was not subject to forfeiture.

On April 1, 1993, the district court granted the government's motion and entered a judgment ordering that the entire res be forfeited to the United States. Adopting the government's proposed statement of uncontroverted facts and conclusions of law with only a few minor alterations, the district court held that "[t]he convictions of Arlt, Wren and Hill of conspiracy to aid and abet the manufacture of methamphetamine, conspiracy to launder monetary instruments, and money laundering are sufficient for probable cause by themselves." The court also noted several additional factors, relating to specific pieces of property, which bolstered its conclusion that the government had established probable cause. For example, the court noted that $123,000 is an extremely large amount of cash, that Arlt, Wren, and Hill had signature authority over several of the bank accounts, and that the vehicles were purchased with cash and placed in the name of Arlt's business, Payback Mines. The district court concluded that the government had established probable cause under both its "narcotics proceeds" theory and its "money laundering" theory. Because the claimants did not introduce any evidence tending to show that the property was not subject to forfeiture, the court granted summary judgment in favor of the government. Arlt, Wren, and Payback Mines appeal pro se.

II.

On appeal, Arlt, Wren, and Payback Mines claim that the government lacked probable cause to institute these proceedings, that the Double Jeopardy Clause of the Fifth Amendment bars this action, that the forfeiture violates the Excessive Fines Clause of the Eighth Amendment, and that the district court

lacked in rem jurisdiction over a small part of the res. Where reversal of the district court's judgment on one ground would bar further proceedings against a party opposing the government, while reversal on other grounds would afford less than complete relief to that party, we first decide the issue which would afford complete relief. Here, the Double Jeopardy Clause argument, if successful, would result in a complete bar to the maintenance or reinstitution of these proceedings, while the relief sought on the other grounds would not. Thus, we begin with the Double Jeopardy Clause.[1] In this case, because we hold that the clause is applicable and bars further proceedings, we end with it as well.[2]

A.

The most basic element of the Double Jeopardy Clause is the protection it affords against successive

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[1] The claimants did not raise the double jeopardy argument in the district court. However, they rely on the Supreme Court's decision in *Austin v. United States*, 113 S. Ct. 2801 (1993), which was decided after the district court's judgment in this case. The government has responded to the claimants' argument on the merits, and it has not asserted that the claimants waived the double jeopardy defense. Accordingly, we consider the issue to be properly before us.

[2] Although the claimants' relief would be incomplete if we were to rest our decision on probable cause, and thus we do not reach that ground, it seems clear that the goverment lacked such cause for the institution of these proceedings. In seeking to satisfy its probable cause burden, the government relies almost exclusively on Arlt's and Wren's criminal convictions. Because these convictions were not obtained until *after* the institution of this forfeiture action, it may not do so. *See United States v. $191,910.00 in U.S. Currency*, 16 F.3d 1051, 1066-71 (9th Cir. 1994).

prosecutions—that is, against efforts to impose punishment for the same offense in two or more separate proceedings. That protection applies with equal force whether the first prosecution results in a conviction or an acquittal. *See Burks v. United States*, 437 U.S. 1 (1978); *Brown v. Ohio*, 432 U.S. 161 (1977). Whatever other abuses the Clause prohibits, at its most fundamental level it protects an accused against being forced to defend himself against repeated attempts to exact one or more punishments for the same offense. "The basis of the Fifth Amendment protection against double jeopardy is that a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts." *Abbate v. United States*, 359 U.S. 187, 198-99 (1959) (opinion of Brennan, J.). This principle is "deeply ingrained in at least the Anglo-American system of jurisprudence," *Green v. United States*, 355 U.S. 184, 187 (1957), and, in fact, traces its roots "deep into Greek and Roman times." *Bartkus v. Illinois*, 359 U.S. 121, 151-52 (1959) (Black, J., dissenting).

There can be little doubt that this case implicates the core Double Jeopardy protection. Over a year after the claimants' criminal convictions, a different district judge in a different proceeding awarded the government title to nearly all of the claimants' property, because of its connection with the *very offenses* that resulted in criminal punishment. The forfeiture complaint in this case was based on precisely the same conduct addressed in the claimants' criminal case, and it sought to forfeit title to the claimants' property on the basis of precisely the same violations of the same statutes. In short, this civil forfeiture

action and the claimants' criminal prosecution addressed the identical violations of the identical laws; the only difference between the two proceedings was the remedy sought by the government. Yet the government could have sought both remedies without subjecting Arlt and Wren to multiple and successive proceedings. It could have included a criminal forfeiture count in the indictment which led to the claimants' convictions. However, it did not choose to follow that course. Rather, it elected to pursue its forfeiture action in a separate and parallel proceeding, which was decided after the criminal trial. By doing so, the government prevented Arlt and Wren from "being able, once and for all, to conclude [their] confrontation with society" at the time of the jury's verdict. *United States v. Jorn*, 400 U.S. 470, 486 (1971) (opinion of Harlan, J.).

The government's actions in this case clearly raise substantial double jeopardy concerns. However, to determine whether these actions violate the Fifth Amendment, we must consider two questions: whether the civil forfeiture action and the claimants' criminal prosecution constituted separate "proceedings," and whether civil forfeiture under 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) constitutes "punishment." If the answer to both of these questions is yes, then the government's actions constituted a successive attempt to impose punishment, in violation of the Double Jeopardy Clause.

For the reasons we have expressed above, we have little difficulty in determining that this civil forfeiture proceeding constitutes a separate "proceeding" from the prosecution which resulted in the claimants' criminal convictions. We recognize that the Second and Eleventh Circuits have recently held in cases like

this one that criminal prosecutions do not constitute separate "proceedings" from parallel civil forfeiture actions for double jeopardy purposes. *See United States v. One Single Family Residence*, 13 F.3d 1493, 1499 (11th Cir. 1994); *United States v. Millan*, 2 F.3d 17, 20 (2d Cir. 1993). Those courts relied on the fact that the forfeiture actions and criminal prosecutions took place at approximately the same time and involved the same criminal violations, and were part of a "single, coordinated prosecution." *One Single Family Residence*, 13 F.3d at 1499. For that reason, the Second and Eleventh Circuits refused to conclude that the parallel criminal and civil actions constituted separate "proceedings." However, we believe that the position adopted by the Second and Eleventh Circuits contradicts controlling Supreme Court precedent as well as common sense.

We fail to see how two separate actions, one civil and one criminal, instituted at different times, tried at different times before different factfinders, presided over by different district judges, and resolved by separate judgments, constitute the same "proceeding."[3] In ordinary legal parlance, such actions are often characterized as "parallel proceedings," but not as the "same proceeding." A forfeiture case and a criminal prosecution would constitute the *same* proceeding only if they were brought in the same indictment and tried at the same time.[4] The government

[3] *Cf. Abbate*, 359 U.S. at 202 (Black, J., dissenting) ("The legal logic used to prove one thing to be two is too subtle for me to grasp.").

[4] We do not mean to suggest that the Double Jeopardy Clause prevents a forfeiture count from being tried separately from other criminal counts based on the same offense if the

could have sought criminal forfeiture in this case pursuant to 18 U.S.C. §§ 982, 3554 and 21 U.S.C. § 853. If it had done so and included the forfeiture count in the same indictment as the other criminal counts and then proceeded to trial against the defendants on all counts, the forfeiture case and the criminal prosecution would have constituted the "same proceeding."[5] However, the government chose to proceed against the claimants on two separate fronts—in two separate, parallel proceedings. Because the district court followed the customary practice and held the civil action in abeyance pending the outcome of the criminal prosecution, the government obtained a significant advantage: if it succeeded in the criminal case it could obtain summary judgment based on the conviction (assuming of course that it had probable cause at the time it instituted the forfeiture action), while if it lost it could still seek forfeiture and urge that the more lenient standards applicable in civil proceedings applied. *See* 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶ 10.01, at 10-4 to 10-5 (1993) (noting that it is to the government's advantage to have the civil forfeiture action heard after the criminal case). We believe that such a coordinated,

defendant *consents* to separate trials. Nor do we express any view as to bifurcated proceedings before the same factfinder and presiding judicial officer.

[5] Such an attempt to impose multiple punishments in the same proceeding would satisfy the Double Jeopardy Clause so long as the legislature intended to impose *both* criminal forfeiture and the more standard criminal penalties for a violation of the criminal statutes at issue here. *See Missouri v. Hunter*, 459 U.S. 359 (1983). The issue in such a case would simply be one of statutory construction.

manipulative prosecution strategy heightens, rather than diminishes, the concern that the government is forcing an individual to "run the gantlet" more than once. *Green*, 355 U.S. at 190. We are not willing to whitewash the double jeopardy violation in this case by affording constitutional significance to the label of "single, coordinated prosecution." [6]

In fact, the Supreme Court has made clear that parallel actions, instituted at about the same time and involving the same criminal conduct, constitute *separate* proceedings for double jeopardy purposes. *See Jeffers v. United States*, 432 U.S. 137 (1977). In *Jeffers*, the government initiated parallel *criminal* actions against the same defendant based on the same conduct by bringing two separate indictments on the same day. One indictment charged a conspiracy to distribute heroin and cocaine, in violation of 21

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[6] Were we to consider successive attempts to exact punishment to constitute the "same proceeding" under the Double Jeopardy Clause simply because they were brought as part of a "single, coordinated prosecution," we would be encouraging one of the worst abuses of prosecutorial power—the government's coordinated use of multiple proceedings to harass or exhaust particular defendants. In one prominent recent example, the federal government unsuccessfully sought to engage in a coordinated campaign of multiple prosecutions in an attempt to shut down one of the largest retail distributors of sexually oriented literature in the United States. *See United States v. P.H.E., Inc.*, 965 F.2d 848, 850-53 (10th Cir. 1992) (describing this campaign); *PHE, Inc. v. United States Dep't of Justice*, 743 F. Supp. 15, 17-20 (D.D.C. 1990) (same). In the cited cases, the Tenth Circuit ordered a hearing regarding whether an indictment arising from this scheme should be dismissed on the grounds of prosecutorial vindictiveness, *see* 965 F.2d at 860, and the District Court for the District of Columbia issued a preliminary injunction against further prosecution of the scheme. *See* 743 F. Supp. at 27.

U.S.C. §§ 841(a)(1) and 846. The other indictment charged Jeffers with conducting a continuing criminal enterprise to violate the drug laws, in violation of 21 U.S.C. § 848. Jeffers opposed the government's motion to join the offenses for trial, and the district court denied the motion. After the first jury convicted Jeffers of the conspiracy count, he moved to dismiss the continuing criminal enterprise case on double jeopardy grounds. The district court held that 21 U.S.C. §§ 846 and 848 constituted separate offenses for double jeopardy purposes, and accordingly denied the motion. The Seventh Circuit affirmed on the same ground.

In affirming the judgment of Seventh Circuit, the Supreme Court explicitly rejected that court's reasoning. It held that 21 U.S.C. § 846 was a lesser included offense of 21 U.S.C. § 848. Accordingly, the two statutes stated the "same offense" under the *Blockburger* test, and the second and separate prosecution would ordinarily have been barred by the Double Jeopardy Clause. *See Jeffers*, 432 U.S. at 147-51 (plurality opinion); *id.* at 158 (Stevens, J., dissenting in part and concurring in the judgment in part). However, the plurality of four justices held that, by opposing the government's motion for joinder, Jeffers had waived any objection to the maintenance of separate proceedings. *See id.* at 152 (plurality opinion) ("[A]lthough a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his selection."). In dissent, Justice Stevens (joined by three other justices) argued that Jeffers had not waived any double

jeopardy objection, and that a separate trial on the second indictment was accordingly barred. *See id.* at 158-60 (Stevens, J., dissenting in part and concurring in the judgment in part). In short, the decisions of eight of the nine justices in *Jeffers* rested on the common sense proposition that two parallel criminal cases, which unquestionably were brought as a part of a "single, coordinated prosecution," constituted "separate proceedings" for double jeopardy purposes.[7] *See also Missouri v. Hunter*, 459 U.S. 359, 360, 366, 367, 368, 369 (1983) (stating that there is no double jeopardy bar to the imposition of multiple punishments at a "single *trial*") (emphasis added); *see also id.* at 365 ("Because respondent has been subjected to *only one trial*, it is not contended that his right to be free from *multiple trials* for the same offense has been violated.") (emphasis added). We can discern no reason why two proceedings should be deemed one when one of the proceedings involves a criminal prosecution and the other a civil forfeiture action. We conclude, therefore, that whether or not two actions are brought as part of a "single, coordinated prosecution" is irrelevant for purposes of the Double Jeopary Clause: a civil forfeiture action which is brought and tried separately from a criminal prosecution and is based upon the same offense constitutes a separate "proceeding." Thus, we must turn to the question whether the forfeiture the government seeks to impose constitutes "punishment."

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[7] The ninth justice, Justice White, did not discuss this issue, because he concluded that 21 U.S.C. § 846 was not a lesser included offense of 21 U.S.C. § 848.

B.

A decade ago, the law was clear that civil forfeitures did not constitute "punishment" for double jeopardy purposes. In *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984), the Supreme Court held that the claimant's prior acquittal on criminal charges did not bar a subsequent action for forfeiture under 18 U.S.C. § 924(d). Applying the test set forth in *United States v. Ward*, 448 U.S. 242, 248 (1980), the Court concluded that Congress intended for forfeiture to be "a remedial civil sanction." *89 Firearms*, 465 U.S. at 363. Accordingly, it held that the Double Jeopardy Clause did not apply.

The *Ward* test, on which the Supreme Court rested its double jeopardy holding in *89 Firearms*, focused heavily on the label Congress had attached to a particular sanction. If Congress indicated a preference that the proceeding be denominated "civil" rather than "criminal," the Court would defer to that preference except in extraordinary circumstances. *See Ward*, 448 U.S. at 248. However, as sometimes happens, the Court changed its collective mind. It abandoned the *Ward* approach in *United States v. Halper*, 490 U.S. 435 (1989). There, the Court held that "the labels 'criminal' and 'civil' are not of paramount importance" in determining whether a sanction constitutes punishment for double jeopardy purposes: "The notion of punishment, as we understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads." *Id.* at 447-48. Apply-

ing these principles, the Court adopted a new test for determining whether a nominally civil sanction constitutes "punishment" for double jeopardy purposes: "[A] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as *also* serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* at 448 (emphasis added). Just last year it reaffirmed its new-found wisdom, emphasizing again that a sanction which is designed even in part to deter or punish will constitute punishment, regardless of whether it also has a remedial purpose. *See Austin v. United States*, 113 S. Ct. 2801, 2806, 2812 (1993); *see also United States v. Hudson*, 14 F.3d 536, 540 (10th Cir. 1994) ("Appellants contend that the above quoted language means that unless a sanction is 'solely' remedial, i.e., not serving deterrent or retributive ends, it is punishment. This position is confirmed by the recent Supreme Court decision in *Austin v. United States*.").

Halper involved a civil action brought under the False Claims Act. In *United States v. McCaslin*, 959 F.2d 786 (9th Cir.), *cert. denied*, 113 S. Ct. 382 (1992), we underestimated its force and refused to apply its rationale in a civil forfeiture action brought under 21 U.S.C. § 881(a)(7). We held that "*Halper* has no application to the very ancient practice by which instrumentalities of a crime may be declared forfeit to the government." *McCaslin*, 959 F.2d at 788. However, in its subsequent decision in *Austin*, the Supreme Court said that we were wrong and directly rejected our *McCaslin* analysis. In *Austin*, the Court specifically applied the *Halper* test to determine whether a civil forfeiture under 21 U.S.C. §§ 881(a)(4) & (a)(7) constituted "punishment,"

and it concluded that those provisions did in fact impose punishment under that test. *See Austin*, 113 S. Ct. at 2812 ("In light of the historical understanding of forfeiture as punishment, the clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood these provisions as serving to deter and to punish, we cannot conclude that forfeiture under §§ 881(a)(4) and (a)(7) serves solely a remedial purpose.") (citing *Halper*, 490 U.S. at 448).

As the government notes, the specific holding in *Austin* was that the Eighth Amendment's Excessive Fines Clause applies to civil forfeiture actions. However, in determining whether the Excessive Fines Clause applied, the Court found it necessary to determine, as we are required to determine here, whether the forfeiture statutes at issue constituted "*punishment.*" It employed the *Halper* test—the same test it had used to decide whether a civil monetary penalty constituted "punishment" for purposes of the Double Jeopardy Clause—in making that determination. We believe that the only fair reading of the Court's decision in *Austin* is that it resolves the "punishment" issue with respect to forfeiture cases for purposes of the Double Jeopardy Clause as well as the Excessive Fines Clause. In short, if a forfeiture constitutes punishment under the *Halper* criteria, it constitutes "punishment" for purposes of *both* clauses.[8] *See* Smith, *supra*, ¶ 12.10[2], at 12-131

[8] To make it clear, we hold only that because the method of determining whether the forfeiture constitutes punishment is identical, the answer to the question whether a particular forfeiture constitutes punishment will always be the same for purposes of the Double Jeopardy Clause and the Eighth Amendment. Whether a violation of either clause

("The Supreme Court's decision in *Austin v. United States*, makes it clear that *Halper*'s double jeopardy protections do apply to the vast majority of civil forfeiture cases.") (footnote omitted). In light of the decision in *Austin*, and applying the *Halper* test here, we find the conclusion inescapable that civil forfeiture under 18 U.S.C. § 981(a)(1)(A) and 21 U.S.C. § 881(a)(6) constitutes "punishment" which triggers the protections of the Double Jeopardy Clause.

The government argues that the *Austin* Court's reasoning does not apply to the forfeitures in this case. It asserts that *this* forfeiture involves only narcotics proceeds, and that such a forfeiture is entirely remedial. The government's position finds support in a recent Fifth Circuit case. *See United States v. Tilley*, 18 F.3d 295, 300 (5th Cir. 1994) (stating that the forfeiture of illegal proceeds does not constitute punishment).[9] We nonetheless reject that argument. We do so because the government fails to recognize the legal standard that *Austin* established.

Under *Austin*, in order to determine whether a forfeiture constitutes "punishment," we must look to the entire scope of the statute which the government seeks to employ, rather than to the characteristics of the specific property the government seeks to forfeit.

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exists involves factors that are different with respect to each clause. Thus, even though we may conclude that a particular forfeiture may involve "punishment," we could still conclude, depending on the facts in the case before us, that both clauses were violated, neither clause was violated, or a violation of one but not the other occurred.

[9] The government also relies on the Fourth Circuit's pre-*Austin* decision in *United States v. Borromeo*, 995 F.2d 23, 27 (4th Cir. 1993). For the reasons set forth in the text, we believe that *Borromeo* does not survive *Austin*.

The government appears to assume that we must determine in each case whether the particular forfeiture is so excessive in relation to any remedial goal that it must be denominated as "punishment." However, the *Austin* Court explicitly refused to apply such a case-by-case approach to determining whether a forfeiture constitutes "punishment." *See Austin*, 113 S. Ct. at 2812 n.14. Rather, largely because "forfeiture statutes historically have been understood as serving not simply remedial goals but also those of punishment and deterrence," *id.*, the Court held that any determination of whether those forfeitures constitute "punishment" must look to the requirements of the forfeiture *statute* as a whole. *See* Smith, *supra*, ¶ 12.10 at 12-13 ("the *Austin* Court thought that in the forfeiture context it made sense to focus on the forfeiture statute as a whole."). In so doing, the Court adopted a categorical approach to "punishment" determinations in the forfeiture context, much like the categorical approach it has adopted for determining whether a particular statute defines a "violent felony" for purposes of the Firearms Owners' Protection Act. *See Taylor v. United States*, 495 U.S. 575, 600-02 (1990); *see also United States v. Sherbondy*, 865 F.2d 996, 1005-1010 (9th Cir. 1988).[10] To determine whether the forfeiture

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[10] The Court's decision in *Austin* to focus on the forfeiture statute, rather than on the particular conduct alleged by the government, in determining whether the Double Jeopardy Clause applies is also consistent with its decision the same term in *United States v. Dixon*, 113 S. Ct. 2849, 2860 (1993). *Dixon* held that, to determine whether two prosecutions are for the same "offense" under the Double Jeopardy Clause, a court must look to the elements of the statutory offenses charged, rather than the conduct which is alleged to underlie these offenses in the particular case.

the government seeks to impose in these proceedings constitutes "punishment," we must focus on the characteristics of the forfeiture statutes on which it relies.

While the government appears to rely principally on its argument that the res consists entirely of illegal proceeds,[11] we will also construe its argument, generously, as contending that the forfeiture *statutes* involved are limited to the forfeiture of illegal proceeds, and that they therefore do not impose "punishment." This argument not only misconceives the legal standard established in *Austin* but also misstates the scope of the statutes involved. In determining that forfeitures under §§ 881(a)(4) & (a)(7) constituted "punishment" under the *Halper* test, the *Austin* Court relied on three facts. First, the Court noted that "the historical understanding of forfeiture as punishment" weighed heavily in favor of the conclusion that forfeiture continues to serve punitive purposes. *Austin*, 113 S. Ct. at 2812. Second, the Court discerned a punitive purpose from "the clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner." *Id.* According to the

[11] If we were to look to the particular facts of this case, it is far from clear that we would accept the government's argument that the entire res consists of narcotics proceeds. The government apparently believes that we can conclude that money and property are derived from narcotics transactions simply because people with an interest in that property have been convicted of engaging in a narcotics conspiracy. Because, with few exceptions, the government has not provided any evidence of a more specific link between narcotics transactions and the property at issue, it would be most difficult, on the record before us, to conclude that the property consists entirely of illegal proceeds.

Austin Court, this focus was evident from the fact that the statutes "expressly provide an 'innocent owner' defense," and thus authorize forfeiture only where the owner is himself involved in illegal activity. *Id.* at 2810. Finally, the Court in *Austin* relied on "the evidence that Congress understood those provisions as serving to deter and punish" to support its conclusion that the §§ 881(a)(4) & (a)(7) did not serve *solely* remedial purposes. *Id.* at 2812. In substantial part, this evidence consisted of the fact that "Congress has chosen to tie forfeiture directly to the commission of drug offenses." *Id.* at 2811.

Austin thus makes clear that at least three principles are relevant to determining whether a forfeiture constitutes "punishment." First, because of "the historical understanding of forfeiture as punishment," *id.* at 2812, there is a strong presumption that any forfeiture statute does not serve *solely* a remedial purpose. Second, where such a statute focuses on the culpability of the property owner by exempting innocent owners or lienholders, it is likely that the enactment serves at least in part to deter and punish guilty conduct. Finally, where Congress has tied forfeiture directly to the commission of specified offenses, it is reasonable to presume that the forfeiture is at least partially intended as an additional deterrent to or punishment for those violations of law.

These principles dictate that forfeiture under the statutes at issue in this case constitutes "punishment." The historically-based presumption that forfeiture is punishment continues to apply. Moreover, the statutes on which the government relies in this case focus on "the culpability of the owner," *id.*, by providing an "innocent owner" defense. *See* 18

U.S.C. § 981(a)(2) ("No property shall be forfeited under this section to the extent of the interest of an owner or lienholder by reason of any act or omission established by that owner or lienholder to have been committed without the knowledge of that owner or lienholder."); 21 U.S.C. § 881(a)(6) ("[N]o property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."). Finally, in drafting 21 U.S.C. § 881(a)(6) (directly tying forfeiture to "any violation of this subchapter") and 18 U.S.C. § 981(a)(1)(A) (directly tying forfeiture to violation of specific criminal statutes), "Congress has chosen to tie forfeiture directly" to the commission of specific offenses. *Austin*, 113 S. Ct. at 2811. Thus, applying the principles set forth in *Austin*, we must conclude that the statutes relied upon by the government in this case operate at least in part to punish and deter.

Moreover, as we mentioned, the government misrepresents the sweep of the forfeiture statutes it invokes in this case. Despite the government's argument, the statutes are *not* limited to the proceeds of illegal activity. The so-called narcotics proceeds forfeiture statute, 21 U.S.C. § 881(a)(6), applies to all money "furnished or *intended to be furnished* by any person in exchange for a controlled substance" as well as to any money which is "used or *intended to be used to facilitate* any violation of this subchapter." *Id.* (emphasis added). This statutory language is not limited to criminal proceeds—that is, money that *has been furnished* in exchange for drugs. Rather than rendering only the *profits* of drug dealers sub-

ject to forfeiture, the statute applies to nearly any money that is involved in a narcotics transaction in some fashion. In addition to narcotics proceeds, the statute renders forfeitable money that someone intends to use to purchase drugs, or even money that someone intends to use to purchase a car or boat in order to facilitate an illegal narcotics transaction.

The money laundering forfeiture statute, 18 U.S.C. § 981(a)(1)(A), is similarly broad. It applies to any property which is "involved in" an illegal money laundering transaction. The government took pains to argue before the district court that property "involved in" a money laundering offense includes more than the actual money that is laundered. *See* Government's Memorandum of Contentions of Fact and Law (CR 46), at 17-20. Indeed, the government relied on a case which expressly *rejected* any limitation of § 981(a)(1)(A) to criminal proceeds. *See United States v. Certain Funds on Deposit*, 769 F. Supp. 80, 84-85 (E.D.N.Y. 1991) ("As the Government contends, limiting the forfeiture of funds under these circumstances to the proceeds of the initial fraudulent activity would effectively undermine the purpose of the forfeiture statute. Criminal activity such as money laundering largely depends upon the use of legitimate moneys to advance or facilitate the scheme."), *quoted in* Government's Memorandum of Contentions of Fact and Law at 19.[12]

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[12] Because the government argued vigorously in the district court that § 981(a)(1)(A) is not limited to the proceeds of illegal activity, and it continues to rely on that statute in defending the district court's order of forfeiture, it cannot now claim that this case involves *only* the forfeiture of illegal *proceeds*. *See Russell v. Rolfs*, 893 F.2d 1033, 1037-39 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2915 (1991).

As the Supreme Court did in *Austin*, we conclude that the forfeiture statutes at issue here do not serve *solely* a remedial purpose. Accordingly, "even assuming that [these statutes] serve *some* remedial purpose, the Government's argument must fail." *Id.* at 2812 (emphasis added). The civil forfeiture the government seeks to impose constitutes "punishment." Because the government is attempting to exact this form of "punishment" in a separate proceeding from the claimants' criminal trials, this action is barred by the Double Jeopardy Clause.

III.

The Supreme Court's decision in *Austin* will doubtless have a significant effect on the government's manner of proceeding in many cases. Because in the case of statutes like those before us a criminal prosecution and a forfeiture action based on the same offense must now be brought in the same proceeding—that is, the same indictment—the government will often be forced to choose whether to include a criminal forfeiture count in the indictment (and thus forego the favorable burdens it would face in the civil forfeiture proceeding) or to pursue only the civil forfeiture action (and thus forego the opportunity to prosecute the claimants criminally). If, in such cases, the government wishes both to obtain forfeiture and to impose other forms of criminal punishment, it "will have to rely to a much greater extent on criminal forfeiture." Smith, *supra*, ¶ 12.10[2], at 12-131 to 12-132. It is entirely reasonable to put the government to this choice. After *Austin*, the law requires it.

For the foregoing reasons, the judgment of the district court is REVERSED and the case is REMANDED with instructions to dismiss with prejudice.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-55947

D.C. No. CV 91-3264-AWT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
$405,089.23 U.S. CURRENCY, et al.,
Defendants.

CHARLES ARLT, JAMES WREN, PAYBACK MINES,
Claimants-Appellants.

ORDER AND DISSENT

Filed May 30, 1995

Before: Cecil F. Poole and Stephen Reinhardt, Circuit Judges, and Jack E. Tanner,* District Judge.

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* Honorable Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

ORDER

The opinion filed September 6, 1994 is amended as follows:

On Slip op. 10471, please add the following footnote at the end of the text and renumber the footnotes accordingly:

> Our adoption of this categorical approach is also compelled by the Supreme Court's recent decision in *Department of Revenue of Montana v. Kurth Ranch*, 114 S.Ct. 1[9]37 (1994). There, the Supreme Court applied *Austin*'s categorical approach for determining when punishment has been imposed in a Double Jeopardy case arising pursuant to a statute that taxed drug monies. *Id.* at 1948.

All of the panel members have voted to deny the petition for rehearing.

Judge Poole and Judge Reinhardt have voted to reject the suggestion for rehearing en banc and Judge Tanner has so recommended.

The full court was advised of the suggestion for rehearing en banc. A judge of the court requested a vote as to whether to take the case en banc, and a vote was taken. The request failed to secure the affirmative vote of a majority of the active non-recused members of the court.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

RYMER, Circuit Judge, with whom Circuit Judges HALL, WIGGINS, KOZINSKI, O'SCANNLAIN, TROTT and T.G. NELSON join, dissenting from the order rejecting the suggestion for rehearing en banc:

By failing to rehear this case en banc, the court lets stand a decision that "could free hundreds of drug dealers across the western United States." *Why a Major Drug Suspect May Go Free*, S.F. Chron., May 9, 1995, at A1.[1]

The panel held that the government could not convict a drug dealer of trafficking in drugs and then seek civil forfeiture of the proceeds of the illegal transactions. It reasoned that to do so "punishes"—or prosecutes—the dealer twice for the same offense and thus runs afoul of the Double Jeopardy Clause. The flip side of the panel's reasoning is that a drug dealer whose illegally obtained proceeds have previously been seized may not thereafter be prosecuted because he will already have been "punished." This cannot be right.

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[1] As the Chronicle reported:

> Charges against an Oakland man who allegedly ran one of the Bay Area's biggest heroin-smuggling rings may be dropped today as the result of a controversial court ruling that could free hundreds of drug dealers across the western United States.
>
> Pius Ailemen may beat drug trafficking charges in federal court in San Francisco on grounds that a conviction would amount to double jeopardy—authorities have already punished him by seizing his 1991 Alfa Romeo and $4,900 in cash.
>
> The Ailemen case may be the most prominent in California since a U.S. Court of Appeals ruled last year that the government cannot prosecute an alleged drug dealer and separately seize his assets. The ruling has caused hundreds of prisoners to flood the courts with demands for release on double-jeopardy grounds.
>
> "The implications of the decision are staggering," said federal public defender Barry Portman in San Francisco. "If you take this to its logical conclusion, countless people are going to get off."

The Supreme Court has held that the civil forfeiture of contraband is a remedial sanction that does not constitute punishment for double jeopardy purposes. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984). Proceeds are the functional equivalent of contraband. Yet the panel's opinion writes *89 Firearms* off the books by taking one line in *United States v. Halper*, 490 U.S. 435 (1989), and *Austin v. United States*, 113 S. Ct. 2891 (1993), an *excessive fines* case, out of context and surmising that "the Court changed its collective mind" about *double jeopardy*—despite the fact that the Court itself didn't say that it had. This can't be right, either.

Halper did not involve civil forfeiture, but rather a civil fine under the False Claims Act, 31 U.S.C. §§ 3729-3731. In that context, the Court stated that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."[2] 490 U.S. at 448. The Court picked up on this statement in *Austin*, where the issue was whether civil forfeitures of automobiles and real property under 21 U.S.C. §§ 881(a)(4) and (a)(7) are subject to the limitations of the Excessive Fines Clause of the Eighth Amendment. Because the Excessive Fines Clause is implicated whenever a sanction serves at least in part to punish and does not solely

---

[2] *Halper* adopted a rule of reason "for the rare case" where "a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." 490 U.S. at 449. Under those circumstances, the defendant is entitled to an accounting of the government's damages and costs to determine if the penalty amounts to a second punishment.

serve a remedial purpose, the Court concluded that instrumentality forfeitures are subject to excessiveness analysis because they are at least partly punishment.

The panel's opinion collapses *Halper* into *Austin*, converting *Halper*'s rule of reason for the "rare" case into a per se rule for the routine case. It also merges the inquiry for excessive fines cases—whether the amount forfeited is partly punishment—into double jeopardy cases, where the issue is whether the amount forfeited is entirely punishment. And, perhaps most critically, the opinion treats *proceeds*, which are forfeitable under § 881(a)(6), like a car or a house used to facilitate a drug offense. This has to be wrong. *89 Firearms*—which *Austin* distinguishes but leaves intact—says otherwise; and so does the Fifth Circuit, with which we are now squarely in conflict. *United States v. Tilley*, 18 F.3d 295, 300 (5th Cir.) (post-*Austin* and post-*Halper*, forfeiture of illegal proceeds cannot be punishment for double jeopardy purposes because it is of property to which the defendant never had a legal right and "it exacts no price in liberty or lawfully derived property"), *cert. denied*, 115 S. Ct. 574 (1994).

If the Supreme Court *has* changed its mind—if instead of being a *remedial* sanction that does not trigger the double jeopardy bar as *89 Firearms* held with respect to contraband, separating a drug trafficker from the proceeds of his trafficking is *punishment* which either bars forfeiture after conviction or prosecution after seizure—it is up to that Court to say so. I question whether it has.[8] However, the

[8] It is unclear where *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937 (1994), handed down after the panel's opinion was submitted, fits into the equation. *See, e.g., United States v. Torres*, 28 F.3d 1463 (7th Cir.), (Easterbrook, J., suggesting that *Austin*, *Halper* and *Kurth Ranch* together may require as a practical matter that all forfeitures be initiated through criminal proceedings), *cert. denied*, 115 S. C.t 669 (1994). But for present purposes, it suffices to note that *Kurth Ranch* was a double jeopardy case (involving a tax on possession of marijuana imposed after a criminal penalty had been assessed for the same conduct) that was decided after *Austin*, yet mentioned *Austin* only in passing and then only as holding that a civil forfeiture may violate the Eighth Amendment's proscription against excessive fines. *Kurth Ranch*, 114 S. Ct. at 1945.

panel has read the Court's excessive fines and double jeopardy jurisprudence differently. Given the national importance of the civil forfeiture program and the damage that can be wrought from getting it wrong, I dissent from our failure to go en banc.

APPENDIX C

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 91-3264 AWT (Ex.)

UNITED STATES OF AMERICA,
Plaintiff,

v.

$405,089.23 U.S. CURRENCY; $8,929.93 U.S. CURRENCY; $123,000 U.S. CURRENCY; ONE BELL 47 G-2 HELICOPTER, U.S. Registration Number N59H; STORMY SEAS FOUR (SHRIMP BOAT) official number 2159; ONE PIPER CHEROKEE 6 AIRPLANE; ONE HUNDRED THIRTY-EIGHT (138) SILVER BARS; ONE 1985 JAGUAR, VIN: SAJNV5842FC119348; ONE

1981 WELLCRAFT, VIN: HALLWELT1593G788; ONE 1988 JAGUAR, VIN: SAJHU164JC530324; ONE 1986 PORSCHE, VIN: WPOAA0940GN454897; ONE 1988 JAGUAR, VIN: SAJAV1643JC521364; ONE 1986 CHEVROLET, VIN: 1G8CS18RXG0140-772; ONE 1988 MITSUBISHI, VIN: JA7FL24D9-JP0505914; ONE 1987 NISSAN, VIN: JN6ND11S-3HW033709; ONE 1987 SUZUKI, VIN: 1S4JC51C-2H4154485; ONE 1988 JEEP, VIN: 2BCHV8157-JB523469; ONE 1988 CHEVROLET, VIN: 1GCFC-24KOJZ253793; ONE 1983 CHEVROLET, VIN: 1GCS18B9D8132968,
Defendants.

COMPLAINT FOR FORFEITURE

[21 U.S.C. Section 881(a); 18 U.S.C. Section 981]

For its claim against the defendant properties United States of America ("plaintiff") alleges:

1. This is a civil forfeiture action brought pursuant to 21 U.S.C. Section 881 and 18 U.S.C. Section 981.

2. This Court has jurisdiction under 28 U.S.C. Sections 1345 and 1395.

3. Venue lies in this district pursuant to 28 U.S.C. Section 1395 and 21 U.S.C. § 881(j).

4. The defendant properties are:

a. Security Pacific Bank account number 35-339-081, in the name of JAMES HILL, in the amount of $405,089.23.

b. Bank of America account numbers 01963-04647 in the name of JIM WREN, #01969-04649 in the name of JIM WREN, #01964-04854 in the name of Payback Mines, the total amount equalling $8,929.93.

c. One Bell 47 G-2 Helicopter, United States Registration Number N 59 H, purchased by JIM WREN in the name of Payback Mines on January 20, 1991, for $65,000. WREN paid this amount entirely with cash contained in a briefcase.

d. One boat, the Stormy Seas Four, official number #2159, purchased by JIM WREN in the name of Payback Mines, on or about January 30, 1991, for $51,700 in total. WREN paid this amount with cash contained in a briefcase.

e. One Piper Cherokee 6 Airplane, purchased by JIM WREN in the name Payback Mines on January 7, 1991 for $32,000. WREN paid this amount entirely with U.S. currency.

f. One hundred thirty-eight (138) silver bars, valued at approximately $57,000, seized pursuant to a state search warrant at Mayhill Bail Bonds on March 29, 1991.

g. $123,000 in U.S. currency, seized pursuant to a state search warrant at Mayhill Bail Bonds on March 29, 1991.

h. Eleven (11) automobiles and one (1) boat described below:

	Year	Vehicle	VIN NUMBER	License Plate	Purchase Price
a)	1985	Jaguar	SAJNV5842FC119348	None	$ 9,152.50
b)	1981	Wellcraft	HALLWELT1593G788	1BL3594	$ 6,596.50
c)	1988	Jaguar	SAJHU164JC530324	2HP2587	$21,400.00
d)	1986	Porsche	WPOAAO940GN454897	2NED473	$ 9,418.75
e)	1988	Jaguar	SAJAV1643JC521364	2JJK448	$41,470.00
f)	1986	Chevrolet	1G8CS18RXG0140772	None	$18,737.50
g)	1988	Mitsubishi	JA7FL24D9JP0505914	3L50893	$ 3,721.00
h)	1987	Nissan	JN6ND11S3HW033709	3E65279	$ 3,934.00
i)	1987	Suzuki	1S4JC51C2H4154485	2RCY653	$ 4,040.50
j)	1988	Jeep	2BCHV8157JB523469	1JLR102	$ 5,957.50
k)	1988	Chevrolet	1GCFC24K0JZ253793	None	$ 7,129.00
l)	1988	Chevrolet	1G8CS18B9D8132968	2ALC066	$ 3,721.00

INTRODUCTION

5. CHARLES WESLEY ARLT and his associates, including but not limited to, REGINA WREN, JAMES ELI WREN, JAMES ROCKY HILL, DEANNA MARIE PIERCE, ROBERT KUHNLE, ANITA GAGE and DARYL HOUSE are in the business of purchasing chemicals used to manufacture methamphetamine, including hydriotic acid, muriatic acid and red phosphorous. ARLT has purchased and/or established several business entities which he uses to transact business, including HIGHLAND TOWING, PAYBACK MINES and AAA MINERALS. ARLT and his associates cause the wire-transfer of monies to chemical manufacturing companies for the purchase of chemicals, store the chemicals in storage facilities, distribute and arrange for delivery of the chemicals to persons who manufacture methamphetamine and take custody of the monies generated and used in connection with these activities.

6. ARLT and his associates have attempted to create the appearance that the chemicals they purchased were necessary for mining gold at several gold mines allegedly owned by ARLT in Nevada and California. Our investigation reveals that no such mining operations have occurred.

EVIDENCE OF ILLEGAL ACTIVITIES

7. In or about December, 1989, Charles Wesley Arlt and Russell Higgins purchased hydrochloric acid and four hand pumps at Chem Lab, Incorporated, Placentia, California.

8. On or about February 12, 1990, Deanna Marie Pierce purchased a cashier's check with cash at Texas

Commerce Bank in the amount of $33,000, made payable to Calabrian International, Incorporated (hereinafter "Calabrian"), a chemical manufacturing company in New Jersey.

9. On or about February 20, 1990, Deanna Marie Pierce purchased a cashier's check with cash at Texas Commerce Bank in the amount of $33,159, made payable to Calabrian.

10. On or about February 20, 1990, Deanna Marie Pierce ordered approximately 4,000 pounds of hydriotic acid, on behalf of AAA Minerals Company, from Calabrian, to be delivered to 209 South Friendswood Drive, Friendswood, Texas.

11. On or about February 23, 1990, Deanna Marie Pierce ordered approximately 4,000 pounds of hydriotic acid, on behalf of AAA Minerals Company, from Calabrian, to be delivered to 209 South Friendswood Drive, Friendswood, Texas.

12. On or about March 14, 1990, Deanna Marie Pierce wire-transferred approximately $33,000 from AAA Minerals Company's bank account at Community National Bank in Friendswood, Texas, to Calabrian's bank account at National Westminster Bank, New Jersey.

13. In or about April, 1990, Charles Wesley Arlt purchased and took delivery of approximately 500 pounds of red phosphorous from Great Lakes Chemical Company, Melrose Park, Illinois.

14. On or about April 16, 1990, Deanna Marie Pierce ordered approximately 8,000 pounds of hydriotic acid, on behalf of AAA Minerals, from Calabrian, to be delivered to 209 South Friendswood Drive, Friendswood, Texas.

15. On or about May 2, 1990, Charles Wesley Arlt deposited approximately $65,770 in cash into AAA Minerals Company's bank account at Community National Bank. Charles Wesley Arlt then wire-transferred the funds from the bank account to Calabrian's bank account at National Westminster Bank, New Jersey.

16. On or about June 26, 1990, Charles Wesley Arlt purchased a cashier's check with cash at the Bank of San Bernardino in the amount of $35,000, made payable to AAA Minerals Company.

17. On or about July 3, 1990, Charles Wesley Arlt took delivery of eight 55-gallon barrels of hydriotic acid solution at the Consolidated Freightways terminal in Colton, California. The hydriotic acid solution had been shipped by Calabrian to AAA Minerals Company.

18. On or about July 13, 1990, Charles Wesley Arlt wire-transferred approximately $45,000 to defendant Deanna Marie Pierce's bank account at Texas Commerce Bank.

19. On or about July 13, 1990, Deanna Marie Pierce wire-transferred approximately $34,921.42 from her bank account at Texas Commerce Bank to Calabrian's bank account at National Westminster Bank, New Jersey.

20. On or about July 19, 1990, James Eli Wren took delivery of eight 55-gallon barrels of hydriotic acid solution at the Consolidated Freightways terminal in Colton, California. The hydriodic acid solution had been shipped by Calabrian to AAA Minerals Company.

21. On or about August 1, 1990, Charles Wesley Arlt deposited approximately $39,007 in cash into his bank account at the Bank of San Bernardino. Charles Wesley Arlt then wire-transferred approximately $35,000 to Deanna Marie Pierce's bank account owned at the First Bank of Deerpark.

22. On or about August 1, 1990, Deanna Marie Pierce wire-transferred approximately $34,649 from her bank account at First Bank of Deerpark to Calabrian's bank account, National Westminster Bank, New Jersey.

23. On or about August 1, 1990, Deanna Marie Pierce ordered approximately 4,800 pounds of hydriotic acid solution, on behalf of AAA Minerals Company, from Calabrian, to be delivered to 424-A East Rialto Avenue, San Bernardino, California.

24. On or about August 8, 1990, Charles Wesley Arlt purchased Highland Towing Company, 27110 East Third Street, San Bernardino, California.

25. On or about August 10, 1990, James Eli Wren rented Unit A-19, 1180 East Ninth Street, San Bernardino, California.

26. On or about August 21, 1990, James Eli Wren deposited $10,605 in cash into a bank account at the Bank of San Bernardino. James Eli Wren then wire-transferred approximately $2,975 to Great Lakes Chemical Company's bank account in Melrose Park, Illinois.

27. On or about August 27, 1990, James Eli Wren deposited approximately $71,000 in cash into Charles Wesley Arlt's bank account at the Bank of San Bernardino. James Eli Wren then wire-transferred the funds to Deanna Marie Pierce's bank account at the First Bank of Deerpark.

28. On or about August 27, 1990, Deanna Marie Pierce wire-transferred approximately $68,315.40 to Calabrian's bank account, National Westminster Bank, New Jersey.

29. On or about August 30, 1990, Charles Wesley Arlt purchased approximately 700 pounds of red phosphorous from Great Lakes Chemical Company, Melrose Park, Illinois. Charles Wesley Arlt took delivery of the red phosphorous on that day at a warehouse rented by him, 422 East Rialto Avenue, Unit A, San Bernardino, California.

30. On or about September 5, 1990, James Eli Wren took delivery of sixteen (16) 55-gallon barrels of hydriotic acid solution at the Consolidated Freightways terminal in Colton, California. The hydriotic acid solution had been shipped by Calabrian to AAA Minerals Company.

31. On or about September 14, 1990, Charles Wesley Arlt purchased, with cash, a 160-acre parcel of property in Oceola, Nevada, commonly known as the old Marriott Ranch.

32. On or about October 10, 1990, James Eli Wren deposited $42,600 in cash into defendant Charles Wesley Arlt's bank account at the Bank of San Bernardino. James Eli Wren then wire-transferred approximately $38,000 to Deanna Marie Pierce's bank account at the First Bank of Deerpark.

33. On or about October 10, 1990, Deanna Marie Pierce wire-transferred approximately $37,503 to Calabrian's bank account, National Westminster Bank, New Jersey.

34. On or about October 12, 1990, James Eli Wren took delivery of eight 55-gallon barrels of hydriotic acid solution at the Consolidated Freightways

terminal in Colton, California. The hydriotic acid solution had been shipped by Calabrian to AAA Minerals Company.

35. On or about November 5, 1990, James Eli Wren deposited approximately $40,000 in cash into Charles Wesley Arlt's bank account at the Bank of San Bernardino. James Eli Wren then wire-transferred the funds to Deanna Marie Pierce's bank account at the First Bank of Deerpark.

36. On or about November 5, 1990, Deanna Marie Pierce wire-transferred approximately $36,981 into Calabrian's bank account, National Westminster Bank, New Jersey.

37. On or about November 6, 1990, Charles Wesley Arlt took delivery of eight 55-gallon barrels of hydriotic acid solution at the Consolidated Freightways terminal in Colton, California. The hydriotic acid solution had been shipped by Calabrian to AAA Minerals Company.

38. On or about November 8, 1990, James Eli Wren purchased a cashier's check in the amount of $200,000, in cash, made payable to Charles Wesley Arlt.

39. On or about November 8, 1990, Charles Wesley Arlt endorsed the $200,000 cashier's check purchased by James Eli Wren and personally delivered it to Unibank, New York. Charles Wesley Arlt deposited the funds into his bank account, Unibank, New York. Charles Wesley Arlt instructed Unibank to forward the funds to Unibank, Luxembourg to a bank account controlled by Charles Wesley Arlt, Joseph David Arlt and Leonard Friedman.

40. On or about November 27, 1990, Regina Wren, wife of defendant James Eli Wren, deposited $47,069 in cash into Charles Wesley Arlt's bank account at

the Bank of San Bernardino. Regina Wren then wire-transferred approximately $40,000 to Deanna Marie Pierce's bank account at the First Bank of Deerpark.

41. On or about November 27, 1990, Deanna Marie Pierce wire-transferred approximately $36,981 to Calabrian's bank account, National Westminster Bank, New Jersey.

42. On or about December 2, 1990, James Eli Wren rented Unit A-10, 1180 East Ninth Street, San Bernardino, California.

43. On or about December 3, 1990, Robert Kuhnle took delivery of eight 55-gallon barrels of hydriotic acid solution at the Consolidated Freightways terminal in Colton, California. The hydriotic acid solution had been shipped by Calabrian to AAA Minerals Company.

44. On or about December 2, 1990, Charles Wesley Arlt purchased the following ammunition at a sporting goods store in Ely, Nevada: two boxes of .38 caliber ammunition, four boxes of .44 magnum ammunition, two boxes of .30 caliber carbine ammunition, four boxes of shotgun shells, and two boxes of .380 automatic ammunition.

45. On or about December 14, 1990, James Eli Wren brought $92,000 in cash into the Bank of San Bernardino. James Eli Wren then wire-transferred approximately $80,000 to defendant Deanna Marie Pierce's bank account at the First Bank of Deerpark.

46. On or about December 17, 1990, Deanna Marie Pierce wire-transferred approximately $73,962 to Calabrian International Incorporated's bank account, National Westminster Bank, New Jersey.

47. On or about December 17, 1990, Robert Kuhnle took delivery of twelve (12) 55-gallon barrels

of hydriotic acid solution at the Consolidated Freightways terminal in Colton, California. The hydriotic acid solution had been shipped by Calabrian to AAA Minerals Company.

48. On or about January 25, 1991, James Eli Wren deposited $80,000 in cash into defendant Charles Wesley Arlt's bank account at the Bank of San Bernardino. James Eli Wren then wire-transferred the funds to defendant Deanna Marie Pierce's bank account at the First Bank of Deerpark.

49. On or about January 25, 1991, Deanna Marie Pierce wire-transferred approximately $73,962.88 to Calabrian International Incorporated's bank account, National Westminster Bank, New Jersey.

50. On or about February 5, 1991, Robert Kuhnle took delivery of eight 55-gallon barrels of hydriotic acid solution at the Consolidated Freightways terminal in Colton, California. The hydriotic acid solution had been shipped by Calabrian to AAA Minerals Company.

51. On or about February 9, 1991, Robert Kuhnle took delivery of eight 55-gallon barrels of hydriotic acid solution at the Consolidated Freightways terminal in Colton, California. The hydriotic acid solution had been shipped by Calabrian to AAA Minerals Company.

52. On or about February 12, 1991, James Eli Wren distributed two 55-gallon barrels of hydriotic acid solution, purchased from Calabrian, in the parking lot of the Comfort Inn, San Bernardino, California.

53. On or about February 12, 1991, Deanna Marie Pierce ordered 16 55-gallon containers of hydriotic acid solution from Calabrian on behalf of AAA Minerals Company.

54. On or about February 12, 1991, Charles Wesley Arlt and James Eli Wren deposited approximately $80,000 in cash into a bank account at the Security Pacific National Bank, San Bernardino, California. On that same day, Charles Wesley Arlt and James Eli Wren wire-transfererd those funds to Deanna Marie Pierce's bank account at the First Bank of Deerpark.

55. On or about February 12, 1991, a Juana Velasco, possessed approximately ten (10) pounds of methamphetamine and approximately $40,000 in the parking lot of the Jack and Jill Coffee Shop, located at 1224 Waterman Avenue, San Bernardino, California.

56. On or about February 12, 1991, a Bobby Joe Jones, possessed approximately 125 pounds of methamphetamine, and approximately five (5) 55-gallon containers of hydriotic acid solution, at a storage facility located at 1070 Jersey Boulevard, #640, Rancho Cucamonga, California.

57. On or about February 19, 1990, James Rocky Hill arranged for the delivery of 3,000 pounds of red phosphorous to Daryl House at 56024 Tracy Boulevard, Yucca Valley, California.

58. On or about February 20, 1991, Daryl House took delivery of approximately 3,000 pounds of red phosphorous at his residence located at 56024 Tracy Boulevard, Yucca Valley, California. The red phosphorous was shipped to "Omni Mining" by Jayar-Hoag Chemical in Lake Zurich, Illinois.

59. On or about February 21, 1991, James Eli Wren transported in excess of $123,000 in cash from Security Pacific National Bank, San Bernardino, California, to Mayhill Bail Bonds, San Francisco, California.

60. On or about February 22, 1991, Charles Wesley Arlt purchased a cashier's check, with cash, at the Bank of America in the amount of $200,000. The cashier's check was made payable to Unibank.

61. On or about March 21, 1991, James Rocky Hill possessed approximately $400,000 in his savings account at the Security Pacific National Bank, Rubidoux Branch, 5694 Mission Boulevard, Riverside, California. The $400,000 had been wire-transferred that day to James Rocky Hill's bank account from Charles Wesley Arlt's bank account at Unibank in Luxembourg.

62. On or about March 21, 1991, James Rocky Hill made arrangements with Security Pacific National Bank to withdraw the $400,000 from his savings account in cash on March 29, 1991.

63. On or about March 29, 1991, Daryl House possessed recipes detailing methods of manufacturing methamphetamine at his residence located on Tracy Boulevard in Yucca Valley, California.

64. On or about March 29, 1991, Charles Wesley Arlt and Daryl House possessed a recipe detailing a method of manufacturing methamphetamine at Charles Wesley Arlt's ranch house, located at the Old Marriott Ranch, Oceola, Nevada.

65. On or about March 29, 1991, Charles Wesley Arlt and Daryl House possessed approximately forty-one (41) weapons at Charles Wesley Arlt's ranch house, located at the Old Marriott Ranch, Oceola, Nevada.

66. On or about March 29, 1991, Charles Wesley Arlt and Daryl House possessed hydriotic acid at Charles Wesley Arlt's ranch house, located at the Old Marriott Ranch, Oceola, Nevada.

INVESTIGATION RE PROPERTY TO BE FORFEITED

SECURITY PACIFIC BANK ACCOUNT #35-339-081, $405,089.23

67. Phillip Mullins learned from Jim Hensley, the branch manager at the Rubidoux Security Pacific Bank, that he had a discussion with JIM HILL on March 28, 1991. On that day JIM HILL requested that $200,000 be wire transferred from his account, account number #35-339-081 to the account of Payback Mines at Bank of America, account #0196404854. JIM HILL also told Hensley that he wanted to have $200,000 in currency on March 29, 1991. HILL had previously told Hensley that he wanted to withdraw $400,000 in currency on March 29, 1991 to complete a deal for the purchase of precious metals.

68. In a post-arrest interview on March 29, 1991 with JAMES HILL he admitted having knowledge that ARLT was trying to hide his money by putting it in HILL's account. ARLT told HILL he did not want any assets placed in his own name, because he was aware that he was being investigated by a multi-agency task force for narcotics violations. HILL also stated that based on his background and training as a law enforcement officer he suspected that all of ARLT's cash was not from legal sources. On March 29, 1991, I served a federal search warrant on Security Pacific Bank demanding that the account be frozen and that the funds be disbursed to the Federal government when demanded.

BANK OF AMERICA ACCOUNT NUMBERS 01963-04647; 01969-40649; 01964-04854

69. I learned from Lynne Buhunen of Bank of America that two accounts for Highland Towing were opened on February 20, 1991 showing the signature authority to be JIM WREN, REGINA WREN, CHARLES W. ARLT and JAMES HILL. The account numbers are #01963-04647 and #01969-04649. On March 28, 1991, JIM and REGINA WREN opened an account in the names of Payback Mines. Only JIM and REGINA WREN had signature authority on this account. On March 29, 1991 the total of all balances in the three accounts was $8,929.23. This amount was paid over to the San Bernardino Sheriff's Department with a cashier's check pursuant to a state seizure warrant.

BELL 47 HELICOPTER—U.S. REGISTRATION NUMBER—N 59 H

70. On April 4, 1991 Mullins spoke with Edward Mauldin of Sundance Helicopters in Lancaster, California. Mr. Mauldin provided the details involving JIM WREN's purchase of one Bell 47 Helicopter. On Sunday, January 20, 1991, a man who introduced himself as JIM WREN came to Mauldin's place of business to purchase a helicopter. After taking JIM WREN and an associate of WREN's for a test flight, JIM WREN agreed to purchase the helicopter for $65,000. WREN presented Mr. Mauldin with $65,000 in U.S. currency, which was contained in WREN's briefcase. Most of the cash was in $100 bills with some in $50 and $20 denominations.

71. WREN requested that the helicopter be registered in the name of Payback Mines. WREN also

signed the bill of sale, signing as the vice president of Payback Mines. Mr. Mauldin witnessed WREN's signature and mailed the completed bill of sale to FAA.

72. WREN informed Mauldin that he and his partners were involved in a gold mining operation. He explained that they deal in cash because that was the method in which the assayers paid them for the gold. WREN indicated that everybody in the gold business deals in cash. This helicopter was seized pursuant to a state seizure warrant on March 29, 1991.

STORMY SEAS FOUR (SHRIMP BOAT)—OFFICIAL NUMBER 2159

73. On April 3, 1991, Mullins spoke with Buck Heard, Sales Manager of the Rowell Realty and Auction Company regarding the purchase by JIM WREN of the Stormy Seas Four fishing boat. On or around January 30, 1991, JIM WREN purchased this boat at an auction for $51,700. The boat is described as a 73-foot shrimp trawler with a 3208 Cat engine and KW generator. The boat was also equipped with a depth recorder, VHF radio and auto pilot. The official number 2159 is burned into the hull of the boat. The boat was manufactured by the DESCO Ship Builders in St. Augustine, Florida.

74. WREN paid for the Stormy Seas Four with $51,700 in U.S. currency contained in a briefcase. Most of the bills were in small denominations. While counting the money one of WREN's associates, earlier identified as his son, pulled out a gun and laid it on the table for an unstated reason. The boat's name was changed to "Mariah." The boat was in dry dock for repairs in Biloxi, Mississippi immediately before

being seized by federal agents of the IRS. The seizure was accomplished pursuant to a seizure warrant obtained in the Federal Judicial District of Mississippi.

PIPER CHEROKEE 6 AIRPLANE

75. On April 3, 1991, Mullins spoke with Larry Oyers, owner of Western Cardinal, Inc., a company in the business of selling and renting aircraft, regarding the purchase by JIM WREN of a Piper Cherokee 6 airplane. On or about Sunday, December 30, 1990, a JIM WREN and CHARLES ARLT came to Oyers' business to look at this aircraft. On or about Monday, January 7, 1991, Oyers received a telephone call from JIM WREN, who stated that ARLT wanted to buy the airplane on that day. WREN and Oyers met at Redlands Aviation on January 7, 1991. After an inspection of the airplane the two drove to Highland Towing Company. After agreeing on a price of $32,000, WREN presented Oyers with a brown paper bag containing $32,000 in U.S. currency. According to Oyers, most of the cash was in small denominations.

76. WREN requested that the airplane be registered in the name of Payback Mines. Oyers witnessed WREN sign the bill of sale as vice president of Payback Mines. Oyers stated that during the several hours that he spent with JIM WREN they engaged in a conversation about the gold mining operations that WREN and ARLT were involved in. WREN told Oyers that ARLT was a prospector who had lived for many years in the Mojave Desert. WREN also stated that ARLT had developed a process to remove gold from trailings at gold mine sites.

WREN also indicated that they were using this process on loads of gold trailings at a mine they owned in Nevada. This airplane was seized pursuant to state seizure warrant executed on March 29, 1991.

SILVER BARS AND $123,000 IN U.S. CURRENCY

77. On March 29, 1991 a state search warrant was executed at Mayhill Bail Bonds, 400 East Rialto, San Bernardino, CA. Approximately 140 silver bars were seized during the search. The total weight of these bars is approximately 13,479 ounces, having a total value of approximately $59,040. In addition, a cardboard box containing $123,000 in U.S. currency was seized pursuant to this search warrant.

78. An elderly female who identified herself as Millie Mayhill responded to the officers' service of the search warrant. Millie Mayhill was read her Miranda warning and she consented to a taped discussion. During this taped conversation with Millie Mayhill, Mayhill advised that her brother is JIM WREN. Mayhill explained that in January 1991 JIM WREN brought silver bars and a box into her place of business, Mayhill Bail Bonds, and placed these items in the back room, which she described as the "safe room."

79. Millie Mayhill stated that she had known "FAT CHUCK", whose real name is CHARLES ARLT, for three years as ARLT would come to her business to bail a lot of his people out of jail. Mayhill also stated that she had heard from her son and from ARLT that ARLT owned a ranch in Nevada, an airplane, a helicopter and also a ship that she believed was docked in Mississippi.

ELEVEN AUTOMOBILES AND ONE BOAT

80. On February 1, 1991, Reserve Deputy Eroe was working at United Auto Auction in Upland, California. WREN purchased eleven cars and one boat from the auction on that date, for a total of approximately $105,000. WREN paid cash for the cars, pulling the money from a paper bag that appeared to have been buried. A tow truck registered to Highland Towing transported all of the cars from the auction. WREN registered all of the cars to Pay Back Mines at 27110 East Third Street, the address of Highland Towing.

81. ARLT was with WREN when he made the above-described purchase. WREN was carrying a handgun, and when questioned by Reserve Deputy Eroe, WREN displayed a badge from the "Department of Defense" and an identification card from the same. Reserve Deputy Eroe assumed that the badge and identification card were legitimate.

82. Rick Martin, an employee of United Auto Auction, also recalled this above-described transaction with WREN and ARLT. Mr. Martin said that ARLT signed the Cash Transaction Report, indicating that he was the President of Pay Back Mines. ARLT had WREN signed the Department of Motor Vehicle documents for the vehicles. Mr. Martin recalled that the cash used to purchase the vehicles was in twenties and hundreds, and was inside a very dirty brown paper bag. ARLT told Mr. Martin that he operated a mining business. Mr. Martin felt that ARLT was directing the transaction as WREN filled out some documents and a female that was with them filled out other documents.

DATED: June 17, 1991

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United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
MANUEL A. MEDRANO
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APPENDIX D

[Filed Feb. 10, 1992]

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 91-3264 AWT

UNITED STATES OF AMERICA, PLAINTIFF,

v.

$405,089.23 U.S. CURRENCY, *et al.*, DEFENDANT.
JAMES WREN, CHARLES ARLT, PAYBACK MINES, CLAIMANTS.

PARTIES' RESPONSE TO ORDER TO SHOW CAUSE

The above-named parties herein submit their joint response to the Court's Order to Show Cause.

On June 17, 1991 plaintiff filed this civil forfeiture action. After providing the above-named claimants with several extensions of time to file a Verified Claim and Answer in this action, claimant Payback Mines served plaintiff with *unverified* claims to the defendant properties on or around October 17, 1991. On October 29, 1991, plaintiff gave notice by letter that the claims filed were insufficient in that they do not comply with Rule C(6), Supplemental Rules for Certain Admiralty and Maritime Claims. Plaintiff therein gave notice that unless claimant filed claims that complied with Rule C(6), plaintiff would seek to strike the claims already filed.

Plaintiff and counsel for claimants have discussed, however, that a stay of this action would be appropriate until the end of the criminal case against, among others, Charles Arlt and James Wren. This case is now being tried in the courtroom of the Honorable Dickran Tevrizian. The criminal trial is expected to be concluded within the next three (3) weeks.

The parties intend to resolve the matter of the insufficient claims by February 17, 1992. If claimant complies with Rule C(6), the parties will file the Joint Report of Early Meeting by February 24, 1992. The parties will indicate in the Joint Report the status of the criminal trial and whether a stay of this civil forfeiture action will be reqeusted.

DATED: February 10, 1992.

LOURDES G. BAIRD
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
MANUEL A. MEDRANO
Assistant United States Attorney
Chief, Asset Forfeiture Section

/s/ Mark A. Feldman
MARK A. FELDMAN
Assistant United States Attorney

Attorneys for plaintiff

DATED: February 10, 1992.

TODD W. MCWHORTER, ESQ.

/s/ Todd W. McWhorter
TODD W. MCWHORTER
[Executed by MAF per telephonic authorization]

Attorney for James Wren

DATED: February 10, 1992.

CARMINE J. COLUCCI, ESQ.

/s/ Carmine J. Colucci
CARMINE J. COLUCCI
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Attorney for Charles Arlt, Payback Mines

APPENDIX E

[Filed Mar. 29, 1993]

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 91-3264 AWT(EEx)

UNITED STATES OF AMERICA,
Plaintiff,

v.

$405,089.23 U.S. CURRENCY; $8,929.93 U.S. CURRENCY; $123,000 U.S. CURRENCY; ONE BELL 47 G-2 HELICOPTER, U.S. Registration Number N59H;

STORMY SEAS FOUR (SHRIMP BOAT) official number 2159; ONE PIPER CHEROKEE 6 AIRPLANE; ONE HUNDRED THIRTY-EIGHT (138) SILVER BARS; ONE 1985 JAGUAR, VIN: SAJNV5842FC119348; ONE 1981 WELLCRAFT, VIN: HALLWELT1593G788; ONE 1988 JAGUAR, VIN: SAJHU164JC530324; ONE 1986 PORSCHE, VIN: WPOAA0940GN454897; ONE 1988 JAGUAR, VIN: SAJAV1643JC521364; ONE 1986 CHEVROLET, VIN: 1G8CS18RXG0140-772; ONE 1988 MITSUBISHI, VIN: JA7FL24D9-JP0505914; ONE 1987 NISSAN, VIN: JN6ND11S-3HW033709; ONE 1987 SUZUKI, VIN: 1S4JC51C-2H4154485; ONE 1988 JEEP, VIN: 2BCHV8157-JB523469; ONE 1988 CHEVROLET, VIN: 1GCFC-24KOJZ253793; ONE 1983 CHEVROLET, VIN: 1GCS18B9D8132968,

Defendants.

Date: December 28, 1992

Time: 10:00 a.m.

Place: Courtroom of the
Honorable A. Wallace
Tashima

STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

Plaintiff, United States of America submits the following statement of uncontroverted material facts and conclusions of law pursuant to Central District of California Local Rule 7.14.1. These include every essential element to entitle plaintiff to a judgment as

a matter of law. All references to exhibits are those exhibits supporting plaintiff's memorandum of points and authorities.

I

STATEMENT OF UNCONTROVERTED FACTS

1. This *in rem* forfeiture action was brought against the defendant properties pursuant to Section 881 of Title 21 and Section 981 of Title 18 of the United States Code. Specifically, the government contends that the defendant properties are forfeitable because they represent items traceable to illegal narcotics activities in violation of 21 U.S.C. 881(a)(6) and because the defendants were involved in financial transactions in violation of 18 U.S.C. §§ 981 and 1956.

2. Claims have been filed in this action by Charles Arlt ("Arlt"), James Wren ("Wren") and Payback Mines. Arlt and his associates, including but not limited to, Wren, James Rocky Hill ("Hill"), Deanna Marie Pierce ("Pierce"), Robert Kuhnle ("Kuhnle"), Anita Gage ("Gage") and Daryl House ("House") were in the business of purchasing chemicals used to manufacture methamphetamine. See Exh. 1 at 2-4.

4. Arlt and his associates purchased cashier's checks, transferred funds and caused the wire-transfer of monies to chemical manufacturing companies for the purchase of chemicals used in the manufacture of methamphetamine.[1] Exh. 1 at ¶¶ 8,

---

[1] All references are to paragraphs ("Overt Acts") contained in the First Superseding Indictment ("Indictment") and the Count in the Indictment associated with the specific Overt Act. A certified copy of which is attached as Exhibit 1.

12, 15, 18, 19, 21 (and Count 18), 23, 26 (and Count 10), 26, 27 (and Count 3), 31 (and Count 11), 31, 32 (and Count 4), 36, 37 (and Count 19), 39, 40 (and Count 5), 46, 47 (and Count 13), 48 (and Count 6), 51, 52 (and Count 14), 53 (and Count 7), 55 (and Count 20), 67 (and Count 15), 68 (and Count 8), 71, 72 (and Count 16), 73 (and Count 9), 78, 79 (and Count 17), 85 (and Count 21), 86, 87 (and Count 22).

5. Arlt and his associates made direct purchases of and ordered chemicals used in the manufacture of methamphetamine. See Exh. 1 at ¶¶ 1-6, 11, 14, 17, 22, 25, 29, 35, 38, 45, 50, 60, 62, 70, 77 (and Count 1).

6. Arlt and his associates stored the chemicals in storage facilities, distributed and arranged for and took delivery of the chemicals. Exh. 1 at ¶¶ 9, 10, 13, 16, 20, 24, 28, 42, 43, 49, 54, 64, 69, 74, 75, 76, 81, 83, 91, 92 (and Count 1).

7. Arlt purchased and/or established several business entities which he used to transact business, including Highland Towing, Inc., AAA Minerals and claimant Payback Mines. Exh. 3 at 5, ¶ 1.

8. Arlt and his associates attempted to create the appearance that the chemicals they purchased were necessary for mining gold at several gold mines allegedly owned by Arlt in Nevada and California. No such mining operations in fact existed. Exh. 3 at 5, ¶ 2.

9. Arlt, Wren and Hill were convicted on each and every count alleged against them in the Indictment. See Exhs. 1, 2. On March 27, 1992, Arlt was convicted of nineteen counts of conspiracy to aid and abet the manufacture of methamphetamine, conspiracy to launder monetary instruments and of

money laundering in violation of 18 U.S.C. § 1956 (a)(1), and Wren was convicted of fifteen counts of the same criminal violations. *Id.* In addition, James Hill was convicted of conspiracy to manufacture methamphetamine and of laundering approximately $400,000, in violation of 18 U.S.C. § 1956(a)(1). *Id.* This act of laundering involved the $405,089.23 that is the first defendant listed in the caption in this case.

10. Arlt, Wren and Hill were convicted of laundering approximately $1,630,000 from July 1990 through March 1991.

11. Count 22 of the Indictment charged Hill with attempting to launder approximately $400,000. Hill was convicted of attempting to launder these funds. See Exhs. 1, 2; Exh. 3 at ¶¶ 115, 116.

12. On March 29, 1991 a state search warrant was executed at Mayhill Bail Bonds, 400 East Rialto, San Bernardino, CA. A cardboard box containing $123,000 in U.S. currency was seized pursuant to this search warrant. See Exh. 3 at ¶ 125.

13. Count 2 of the Indictment, in Paragraph 84, accused Wren of transporting $123,000 from Security Pacific to Mayhill Bail Bonds. See Exh. 1 at ¶ 84.

14. Wren was convicted on Count 2 of the Indictment. See Exhs. 1, 2.

15. On March 29, 1991 a state search warrant was executed at Mayhill Bail Bonds, 400 East Rialto, San Bernardino, CA. See Exh. 3 at ¶ 125. In addition to the above-mentioned $123,000, 138 silver bars were seized during the search. *Id.* The total weight of these bars is approximately 13,479 ounces, having a total value of approximately $59,040. *Id.*

16. An elderly female who identified herself as Millie Mayhill responded to the officers' service of the search warrant. See Exh. 3 at ¶ 126. Millie Mayhill

("Mayhill") was read her Miranda warning and she consented to a taped discussion. *Id.* During this taped conversation with Mayhill, Mayhill advised that her brother is Jim Wren. *Id.* Mayhill explained that in January 1991 Wren brought silver bars and a box into her place of business, Mayhill Bail Bonds, and placed these items in the back room, which she described as the "safe room." *Id.*

17. Mayhill stated that she had known "FAT CHUCK," whose real name is Charles Arlt, for three years as Arlt would come to her business to bail a lot of his people out of jail. See Exh. 3 at ¶ 127.

18. Two accounts for Highland Towing were opened on February 20, 1991 showing the signature authority to be Arlt, Wren and Hill. See Exh. 3 at ¶ 117. Highland Towing was a business entity owned and controlled by Arlt. See Exh. 3 at ¶ 90.

19. On March 28, 1991, Wren opened a third account in the name of Payback Mines, which was a business entity owned by Arlt. See Exh. 3 at ¶¶ 117, 109. Only Jim and Regina Wren had signature authority on this account. *Id.* This account, no. 01964-04854, was supposed to receive the $405,089.23 that was the subject of Hill's money laundering conviction under Count 22. See Exh. 3 at ¶¶ 115, 117.

20. On Sunday, January 20, 1991, a man who introduced himself as Wren came to Edward Mauldin's place of business, named Sundance Helicopters, to purchase a helicopter. See Exh. 3 at ¶ 118. After taking Wren and an associate of Wren's for a test flight, Wren agreed to purchase the helicopter for $65,000. *Id.* Wren presented Mr. Mauldin with $65,000 in U.S. currency, which was contained in Wren's briefcase. *Id.* Most of the cash was in $100

bills with some in $50 and $20 denominations. *Id.*; Exh. 4.

21. Wren requested that the helicopter be registered in the name of Payback Mines. See Exh. 3 at ¶ 119. Wren also signed the bill of sale, signing as the vice president of Payback Mines. *Id.* Mr. Mauldin witnessed Wren's signature and mailed the completed bill of sale to the FAA. *Id.*

22. On or around January 30, 1991, Wren purchased this boat at an auction for $51,700. Exh. 3 at 121.

23. Wren paid for the Stormy Seas Four with $51,700 in U.S. currency contained in a briefcase. Exh. 3 at ¶ 122. Most of the bills were in small denominations. *Id.* While counting the money one of Wren's associates, earlier identified as his son, pulled out a gun and laid it on the table for an unstated reason. *Id.* The boat was in dry dock for repairs in Biloxi, Mississippi immediately before being seized by federal agents of the IRS. *Id.*

24. On or about Sunday, December 30, 1990, Wren and Arlt came to Larry Oyers' business, named Western Cardinal, Inc., to look at a Piper Cherokee 6 airplane. See Exh. 3 at ¶ 123. On or about Monday, January 7, 1991, Oyers received a telephone call from Wren, who stated that Arlt wanted to buy the airplane on that day. *Id.* Wren and Oyers met at Redlands Aviation on January 7, 1991. *Id.* After an inspection of the airplane the two drove to Highland Towing Company. *Id.* After agreeing on a price of $32,000, Wren presented Oyers with a brown paper bag containing $32,000 in U.S. currency. *Id.* According to Oyers, most of the cash was in small denominations. *Id.*

25. Wren requested that the airplane be registered in the name of Payback Mines. See Exh. 3 at ¶ 124. Oyers witnessed Wren sign the bill of sale as vice president of Payback Mines. *Id.*

26. On February 1, 1991, Wren purchased eleven cars and one boat from an auction, for a total of approximately $105,000. See Exh. 3 at ¶ 128; Exh. 5. Wren paid cash for the cars, pulling the money from a paper bag that appeared to have been buried. See Exh. 3 at ¶ 128; Exh. 5 at 1 (Arlt executed Form 8300 as authorized to sign on behalf of Payback Mines). Wren registered all of the cars to Payback Mines at 27110 East Third Street, the address of Highland Towing. See Exh. 3 at ¶ 128.

27. Arlt was with Wren when he made the above-described purchase. See Exh. 3 at ¶ 129.

28. Rick Martin, an employee of United Auto Auction, also recalled this above-described transaction with Wren and Arlt. See Exh. 3 at ¶ 130. Mr. Martin said that Arlt signed the Cash Transaction Report, indicating that he was the President of Pay Back Mines. *Id.*; See Exh. 5 at 1. Arlt had Wren sign the Department of Motor Vehicle documents for the vehicles. *Id.* Mr. Martin recalled that the cash used to purchase the vehicles was in twenties and hundreds, and was inside a very dirty brown paper bag. *Id.* Mr. Martin felt that Arlt was directing the transaction as Wren filled out some documents and a female that was with them filled out other documents. *Id.*

29. On or about May 2, 1991, each of the defendant properties was seized pursuant to seizure warrants. See Exh. 6, a copy of each of the 20 seizure warrants.

III

STATEMENT OF CONCLUSIONS OF LAW

30. Summary judgment shall be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Thus, the government must first establish probable cause to believe that the defendant properties are forfeitable.

31. Unless claimants then are able to establish that the defendant properties were derived from a legitimate source, rather than from proceeds of claimants' methamphetamine activities, a summary judgment of forfeiture is appropriate.

> [T]he summary judgment procedures under Rule 56, Fed.R.Civ.P., must necessarily be construed in the light of the statutory law of forfeitures, and particularly the procedural requirements set forth therein. . . .

United States v. $5,644,540 U.S. Currency, 799 F.2d 1357, 1361 (9th Cir. 1986) (citing *United States v. One 56-Foot Motor Yacht Named Tahuna*, 702 F.2d 1276, 1281 (9th Cir. 1983)).

32. Title 21 section 881(a)(6) of the United States Code provides for forfeiture to the United States of the following:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> * * * * *
>
> (6) All moneys, negotiable instruments, securities, or other things of value furnished or

> intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

33. The burden of proof in civil forfeiture actions is set forth in 19 U.S.C. § 1615. *United States of America v. $5,644,540 in U.S. Currency*, 799 F.2d 1357, 1362 (9th Cir. 1986). Section 1615 provides that to succeed in an action for forfeiture it is the plaintiff who has the initial burden. To satisfy this burden plaintiff must establish probable cause. In a civil forfeiture action under 21 U.S.C. § 881(a) the "government initially must demonstrate probable cause to believe that the property was involved in an illegal drug-related transaction." *Id.* at 1362; *United States of America v. Dickerson*, 873 F.2d 1181, 1184 (9th Cir. 1988).

34. Probable cause is a question of law to be decided by the court. *United States of America v. $93,685.61 in U.S. Currency*, 730 F.2d 571, 572 (9th Cir. 1984; *United States of America v. Padilla*, 888 F.2d 642, 643 (9th Cir. 1989).

35. It is well established that the standard for showing probable cause in a civil forfeiture case is no greater than for a search warrant. *United States of America v. One 56-Foot Yacht Named the Tahuna*, 702 F.2d 1276, 1281 (9th Cir. 1984). Plaintiff must

show that there is *more than a mere suspicion* that the real property *is connected* to illegal drug transactions. "Probable cause is shown if the government produces 'less than prima facie proof but more than mere suspicion.'" *United States of America v. $83,310,78 in U.S. Currency*, 851 F.2d 1231, 1235 (9th Cir. 1988) (citation omitted).

36. In *$83,310.78 in U.S. Currency*, the court upheld a judgment of forfeiture after concluding that the "government had shown that there was *more than a mere suspicion that the seized currency was connected to an illegal drug transaction.*" *Id.* at 1235 (emphasis added).

37. To make its probable cause showing, plaintiff must offer evidence that is "adequate and sufficiently reliable to warrant the belief by a reasonable person" that the defendant real property was connected to drug transactions. *United States of America v. One 56-Foot Yacht Named the Tahuna*, 702 F.2d 1276, 1282 (9th Cir. 1983).

38. Plaintiff may make its probable cause showing by relying upon circumstantial evidence. *United States of America v. $93,685.61 in U.S. Currency*, 730 F.2d 571, 572 (9th Cir. 1984) *cert. denied* 469 U.S. 831, 105 S.Ct. 119, 83 L.Ed.2d 61 (1984). Furthermore, such evidence need not be admissible at trial if the court deems it adequate and sufficiently reliable. *United States of America v. 1982 Yukon Delta Houseboat*, 774 F.2d 1432, 1434 (9th Cir. 1985).[2] "The question of probable cause depends not

---

[2] Accordingly, reliance on the Affidavit of Special Agent Mullins, the Indictment and Criminal Minutes, and other documentary evidence is appropriate. *United States v. One 56-Foot Yacht Named Tahuna*, 702 F.2d 1276, 1282-83 (9th Cir. 1983).

upon the admissibility of the evidence upon which the government relies but only upon the legal sufficiency and reliability of the evidence." *Tahuna*, 702 F.2d at 1283.

39. In deciding whether the United States has established probable cause, the Court must look to the aggregate of facts. *United States v. $83,310.78 in U.S. Currency*, 851 F.2d 1231 (9th Cir. 1988); *$5,644,540 U.S. Currency*, 799 F.2d 1362.

> Probable cause is shown if 'the aggregate of facts gives rise to more than mere suspicion that the property was exchanged for or intended to be exchanged for drugs.'

$83,310.78, 851 F.2d at 1235 (citing *$5,644,540 U.S. Currency.*)

40. In *United States v. $29,959 U.S. Currency*, 931 F.2d 549 (9th Cir. 1991), the court held that possession of large amounts of currency is strong evidence of drug trafficking.

> Cash amounting to $29,959 is an 'extremely large amount' to be kept in the home. . . . This alone is 'strong evidence that the money was furnished or intended to be furnished in return for drugs.

41. Similarly, the use of large amounts of cash to purchase properties is evidence of drug trafficking and that drug proceeds were used to purchase such properties. See *United States v. Thomas*, 913 F.2d 1111, 1115 (4th Cir. 1990).

42. The convictions of Arlt, Wren and Hill of conspiracy to aid and abet the manufacture of methamphetamine, conspiracy to launder monetary instruments and money laundering are sufficient for probable cause by themselves. Nevertheless, with each of

the defendant properties, other than the $405,089.23 and the silver bars, there is additional evidence that clearly establishes probable cause.

43. With regard to the $405,089.23, James Hill has already been convicted of attempting to launder this money. See Exhs. 1, 2. This conviction, under 18 U.S.C. § 1956(a)(1), required that the defendant money was obtained from an unlawful activity, that being methamphetamine trafficking.

44. Wren was convicted on Count 2 of the Indictment, which incorporates Paragraph 84, relating to the $123,000 that Wren transported to Mayhill Bail Bonds. Furthermore, the extremely large amount of currency itself bolsters the existence of probable cause.

45. The $8,929.93 seized from three bank accounts, is also forfeitable. Two of the accounts were in the name of Highland Towing. Only Arlt, Wren and Hill had signature authority on these accounts, indicating that the money was a proceed of their methamphetamine trafficking. Furthermore, Highland Towing was a company owned by Arlt. The third account was opened in the name of Payback Mines, another company owned by Arlt. The fact that this account was also in the name of one of Arlt's companies, also supports the finding of probable cause. See Exh. 3 at ¶ 117.

46. Probable cause for the Bell 47 Helicopter is further supported by the fact that it was purchased with cash for $65,000. Furthermore, the aircraft was placed in the name of Arlt's business, Payback Mines. See Exh. 3 at ¶ 119; See Exh. 5 at 1 (bottom of document indicates that Arlt signed on behalf of Payback Mines.) See Exh. at ¶¶ 118-119.

47. Forfeiture of the Stormy Seas Four shrimp boat is further supported by the fact that it was purchased with $51,700 in currency. Like the helicopter, this fishing vessel was placed in the name of Arlt's business, Payback Mines. See Exh. 3 at ¶ 122.

48. Probable cause for the Piper 6 Cherokee Airplane is bolstered by the purchase of the aircraft with $32,000 in currency. Like the above two properties, the airplane also was placed in the name of Arlt's business, Payback Mines. See Exh. at ¶¶ 123-124.

49. The eleven automobiles and one boat were purchased with $105,000 in cash at an auction. Like the above helicopter, fishing vessel and airplane, the eleven vehicles and one boat also were placed in the name of Arlt's business, Payback Mines. See Exh. at ¶¶ 128-130.

50. Plaintiff also alleges that the defendant properties are forfeitable under 18 U.S.C. § 981(a)(1). Pursuant to section 981(a)(1)(A), if the defendant properties were "involved in" or are traceable to properties involved in violations of 18 U.S.C. § 1956 (a)(1)(B), such properties are forfeitable to the government.

51. The defendant properties were "involved in" or traceable to violations of 18 U.S.C. § 1956(a)(1) (B) if: the defendant properties were derived from a "specified unlawful activity", namely, the manufacture and sale of methamphetamine; and, the defendants were involved in financial transactions designed to conceal the nature, location, source, ownership, or control of the funds.

52. Title 18 section 981(a)(1)(A) of the United States Code provides for forfeiture to the United States of the following:

> Except as provided in paragraph (2), the following property is subject to forfeiture to the United States:
>
> (A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5313(a) or 5234 of title 31, or *of section 1956* or 1957 of this title, or any property traceable to such property.

Id. (emphasis added).

53. Title 18, section 1956(a)(1) defines money laundering as follows:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> (B) knowing that the transaction is designed in whole or in part—
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity . . .

54. The term "specified unlawful activity" includes the violation of the federal narcotics laws.[8]

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[8] The term "specified unlawful activity" is defined in section 1956(c)(7)(A), and includes "any act or activity constituting an offense listed in § 1961(1) of this title . . ." Section 1961(1)(D) includes "any offense involving . . . the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States."

55. As stated above, claimants were convicted of numerous counts of conspiracy to manufacture methamphetamine, conspiracy to launder monetary instruments and money laundering.

56. To be entitled to summary judgment, the government must establish probable cause to believe that the defendant properties were "involved in" or are traceable to money laundering violations; that each was derived from a "specified unlawful activity", methamphetamine activities for instance, and that each of the defendant properties was involved in financial transactions designed to conceal the location, source, ownership and control of that defendant property. *United States v. All Monies*, 754 F. Supp. 1467, 1471 (D. Haw. 1991); *United States v. Padilla*, 888 F.2d 642, 643-44 (9th Cir. 1989).

57. As stated above, to make its probable cause showing, plaintiff must offer evidence that is "adequate and sufficiently reliable to warrant the belief by a reasonable person" that the defendant properties represent the proceeds of claimant's methamphetamine activities. See *United States of America v. One 56-Foot Yacht Named the Tahuna*, 702 F.2d 1276, 1282 (9th Cir. 1983); *United States v. All Monies*, 754 F. Supp. 1467, 1471 (D. Haw. 1991). The standard for establishing probable cause is more than a mere suspicion but less than a preponderance of the evidence. *All Monies*, 754 F. Supp. at 1471; *United States v. Padilla*, 888 F.2d 642, 643-44 (9th Cir. 1989).

58. The defendant properties were involved in financial transactions designed to conceal the location, source or the ownership of the defendant properties or were traceable to such transactions.

59. With regard to the $405,089.23, James Hill has already been convicted of attempting to launder this money. See Exhs. 1, 2. Therefore, it is automatically forfeitable.

60. Wren was convicted of conspiracy to commit laundering in Count 2 of the indictment, which incorporates Paragraph 84. Paragraph 84 alleged that Wren transported $123,000 from Security Pacific Bank to Mayhill Bail Bonds.

61. The $8,929.93 seized from three bank accounts, is also forfeitable. Two of the accounts were in the name of Highland Towing. Only Arlt, Wren and Hill had signature authority on this account, which supports the conclusion that the money was "involved in" or traceable to their methamphetamine activities. Furthermore, Highland Towing was a company owned by Arlt. The third account was opened in the name of Payback Mines, another company owned by Arlt. This fact also supports the conclusion that the funds were traceable to methamphetamine activities. Therefore, it also supports the finding of probable cause. See Exh. 3 at ¶ 117.

62. The Bell 47 Helicopter was involved in or is traceable to a $65,000 cash transaction, designed to conceal the source, ownership, and control of the property. See Exh. 3 at ¶ 118.

63. The Stormp Seas Four shrimp boat was involved in or is traceable to a $51,700 cash transaction, designed to conceal the source, ownership, and control of the property. See Exh. 3 at ¶ 122.

64. The Piper 6 Cherokee Airplane was involved in or traceable to a $32,000 cash transaction, designed to conceal the source, ownership, and control of the property. See Exh. 3 at ¶ 123.

65. The eleven automobiles and one boat were involved in or are traceable to a $105,000 cash transaction designed to conceal the source, ownership, and control of the properties. See Exh. 3 at ¶ 129.

66. As stated above, the government seized three bank accounts containing funds involved in financial transactions. Although there are very few reported opinions interpreting Title 18 section 981(a)(1), property used to "facilitate" illegal money laundering, including a bank account, is forfeitable to the government.

67. This interpretation of section 981(a)(1)(A) is made clear by the legislative history of the statute.

> [T]he term "property involved in" is intended to include the money or other property being laundered (the courts), any commissions or fees paid to the launderer, and *any property used to facilitate the laundering offense.*

134 Cong. Rec. S17365 (daily ed. Nov. 10, 1988) (emphasis added).

68. In *United States v. All Monies*, 754 F. Supp. 1467 (D. Haw. 1991), the court held that forfeiture of an entire bank account used to launder narcotics proceeds was appropriate under 18 U.S.C. § 981(a)(1)(A).

> This Court finds that 18 U.S.C. § 981(a)(1)(A) applies to all property that facilitates violations of §§ 1956 and 1957. Even though § 981 does not expressly include the words "facilitate" or "facilitating," the statute covers property "involved in" illegal money laundering transactions. . . The legislative history makes it clear

> that "property involved in" includes property used tc facilitate money laundering offenses.

Id. at 1473.

69. In *United States v. Certain Funds on Deposit*, 769 F. Supp. 80 (E.D.N.Y. 1991), the court adopted the reasoning of the *All Monies* case. Interpreting 18 U.S.C. § 981(a)(1)(A), the court held that:

> This section has been construed by the district courts as authorizing the forfeiture of an entire bank account or business which was used to "facilitate" the laundering of money in violation of 18 U.S.C. § 981(a)(1)(A).

Id. at 84 (citing *All Monies*, supra; *United States v. 4643 W. Kennedy Blvd.*, No. 90-46-Civ-T-13, slip op., 1990 WL305391 [M.D.Fla. Feb. 12, 1990] (emphasis added).

70. Each of these were accounts controlled by Arlt. This supports the conclusion that these accounts were used to facilitate the numerous money laundering acts committed by Arlt and his associates. In effect, the accounts were used to "facilitate" the laundering of claimants' methamphetamine proceeds. Thus, the accounts and the money in such accounts is forfeitable.

71. Even if claimants could establish that they mixed some legitimately obtained money into the accounts containing narcotics proceeds, all of the money in such accounts is forfeitable. In finding that an entire bank account could be forfeited, even if the account contained legitimate deposits, the court in *Certain Funds on Deposit* reasoned:

> As the government contends, limiting the forfeiture of funds under these circumstances to

> the proceeds of the initial fraudulent activity would undermine the purpose of the forfeiture statute. Criminal activity such as money laundering largely depends upon the use of legitimate monies to advance or facilitate the scheme. It is precisely the commingling of tainted funds with legitimate money that facilitates the laundering and enables it to continue.

Id. at 84-85.

72. Accordingly, the money seized from these accounts should be forfeited if the bank accounts from which the funds were seized contained narcotics proceeds. Unless claimants can establish with competent evidence that such accounts did not contain funds traceable to narcotics proceeds, which they have not, the defendant funds must be forfeited to plaintiff.

73. The uncontroverted facts more than establish probable cause to believe that each of the defendant properties is forfeitable as properties "involved in" money laundering in violation of sections 1956 and 981.

74. Claimants have not offered competent evidence establishing that they had any income other than the proceeds from methamphetamine activities or that the defendant properties were not "involved in" violations of § 1956. Therefore, they have not set forth any fact which raises an issue of fact to be resolved at trial. Accordingly, entry of summary judgment is appropriate in this action.

75. Therefore, under 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) the defendant properties are forfeitable to the plaintiff United States of America.

DATED: Mar. 29, 1993

/s/ A. Wallace Tashima
United States District Judge

PRESENTED BY:

TERREE A. BOWERS
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
MANUEL A. MEDRANO
Assistant United States Attorney
Chief, Asset Forfeiture Section

/s/ Mark A. Feldman
MARK A. FELDMAN
Assistant United States Attorney

Attorneys for Plaintiff

CERTIFICATE OF SERVICE BY REGULAR MAIL

I, Noreen Neria, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is Office of United States Attorney, Federal Building, Suite 7516, 300 North Los Angeles Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by regular mail described in this Certificate was made; that on December 4, 1992, which was deposited in the mail in the Federal Building, Suite 7516, 300 North Los Angeles, California in the above-entitled action, in a envelope bearing the requisite postage, a copy of: Statement of Uncontroverted Facts and Conclusions of Law

Addressed to: Alaleh Kamran; Esq.
4705 Laurel Canyon Boulevard,
Ste. 203
North Hollywood, California 91607

her/his last known address, at which place there is a delivery service by regular mail.

This Certificate is executed on December 4, 1992, at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Noreen Neria
NOREEN NERIA

APPENDIX F

[Filed Mar. 29, 1993]

TERREE A. BOWERS
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
MANUEL A. MEDRANO
Assistant United States Attorney
Chief, Asset Forfeiture Section
MARK A. FELDMAN
Assistant United States Attorney
Federal Building, Suite 7516
300 North Los Angeles Street
Los Angeles, California 90012
Telephone: (213) 894-2569

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 91-3264 AWT(EEx)

UNITED STATES OF AMERICA,
Plaintiff,

v.

$405,089.23 U.S. CURRENCY; $8,929.93 U.S. CURRENCY; $123,000 U.S. CURRENCY; ONE BELL 47 G-2 HELICOPTER, U.S. Registration Number N59H;

STORMY SEAS FOUR (SHRIMP BOAT) official number 2159; ONE PIPER CHEROKEE 6 AIRPLANE; ONE HUNDRED THIRTY-EIGHT (138) SILVER BARS; ONE 1985 JAGUAR, VIN: SAJNV5842FC119348; ONE 1981 WELLCRAFT, VIN: HALLWELT1593G788; ONE 1988 JAGUAR, VIN: SAJHU164JC530324; ONE 1986 PORSCHE, VIN: WPOAAO940GN454897; ONE 1988 JAGUAR, VIN: SAJAV1643JC521364; ONE 1986 CHEVROLET, VIN: 1G8CS18RXG0140-772; ONE 1988 MITSUBISHI, VIN: JA7FL24D9-JP0505914; ONE 1987 NISSAN, VIN: JN6ND11S-3HW033709; ONE 1987 SUZUKI, VIN: 1S4JC51C-2H4154485; ONE 1988 JEEP, VIN: 2BCHV8157-JB523469; ONE 1988 CHEVROLET, VIN: 1GCFC-24KOJZ253793; ONE 1983 CHEVROLET, VIN: 1GCS18B9D8132968,

Defendants.

Date: December 28, 1992

Time: 10:00 a.m.

Place: Courtroom of the
Honorable A. Wallace
Tashima

JUDGMENT

Plaintiff' motion for summary judgment was submitted without oral argument. The Court after considering the papers filed in connection with the motion hereby GRANTS plaintiff's motion.

Accordingly, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's motion

for summary judgment is granted and title to all of the defendant properties is vested in the United States of America.

IT IS FURTHER ORDERED that claimants shall have no further interest in the defendant properties.

DATED: MAR 29 1993

/s/ [Illegible]
United States District Judge

PRESENTED BY:

TERREE A. BOWERS
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
MANUEL A. MEDRANO
Assistant United States Attorney
Chief, Asset Forfeiture Section

/s/ Mark A. Feldman
MARK A. FELDMAN
Assistant United States Attorney

Attorneys for Plaintiff

CERTIFICATE OF SERVICE BY REGULAR MAIL

I, Noreen Neria, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is Office of United States Attorney, Federal Building, Suite 7516, 300 North Los Angeles Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by regular mail described in this Certificate was made; that on December 4, 1992, which was deposited in the mail in the Federal Building, Suite 7516, 300 North Los Angeles, California in the above-entitled action, in a envelope bearing the requisite postage, a copy of: Order

Addressed to: Alaleh Kamran, Esq.
4705 Laurel Canyon Boulevard,
Ste. 203
North Hollywood, California 91607

her/his last known address, at which place there is a delivery service by regular mail.

This Certificate is executed on December 4, 1992, at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Noreen Neria
NOREEN NERIA

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

June 1990 Grand Jury

CR 91-329(A)-DT

UNITED STATES OF AMERICA, PLAINTIFF,

v.

CHARLES WESLEY ARLT, ANITA GAGE, JAMES ELI WREN, DARYLE EUGENE HOUSE, DEANNA MARIE PIERCE, JAMES ROCKY HILL, and ROBERT KUHNLE, DEFENDANTS.

FIRST SUPERSEDING INDICTMENT

[21 U.S.C. §§ 846, 841(a)(1): Conspiracy to Aid and Abet the Manufacture of Methamphetamine; 18 U.S.C. §§ 371, 1956: Conspiracy to Launder Monetary Instruments; 18 U.S.C. § 1956(a): Laundering of Monetary Instruments; 18 U.S.C. § 2: Aiding and Abetting and Causing an Act to be Done]

The Grand Jury charges:

COUNT ONE

[21 U.S.C. §§ 846, 841(a)(1); 18 U.S.C. § 2]

I. *OBJECTS OF THE CONSPIRACY*

Beginning on a date unknown to the Grand Jury and continuing to on or about March 29, 1991, within

the Central District of California and elsewhere, defendants CHARLES WESLEY ARLT, ANITA GAGE, JAMES ELI WREN, DARYLE EUGENE HOUSE, DEANNA MARIE PIERCE, JAMES ROCKY HILL, ROBERT KUHNLE, and others both known and unknown to the Grand Jury, knowingly and intentionally conspired and agreed with each other to commit the following offenses against the United States:

1. To knowingly and intentionally aid and abet the manufacture of 1 kilogram or more of a substance or mixture containing a detectable amount of methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 846, and Title 18, United States Code, Section 2.

2. To knowingly and intentionally manufacture 1 kilogram or more of a substance or mixture containing a detectable amount of methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

II. *MEANS BY WHICH THE OBJECTS OF THE CONSPIRACY WERE TO BE ACCOMPLISHED*

The objects of the conspiracy were to be accomplished in substance as follows:

1. The defendants supplied chemicals used in the manufacture of methamphetamine, including hydriodic acid and red phosphorous, to unindicted co-conspirators, who in turn manufactured methamphetamine. Defendants CHARLES WESLEY ARLT and JAMES ELI WREN wire transferred the funds necessary to purchase hydriodic acid from banks

within the Central District of California to bank accounts in Texas controlled by defendant DEANNA MARIE PIERCE. Defendants CHARLES WESLEY ARLT and ANITA GAGE also transported United States currency to the Texas banks. Defendants CHARLES WESLEY ARLT and DEANNA MARIE PIERCE deposited the currency into the Texas bank accounts controlled by defendant DEANNA MARIE PIERCE.

2. Defendant DEANNA MARIE PIERCE and an unindicted co-conspirator established a company called AAA Minerals Company (hereinafter "AAA Minerals"). Defendant DEANNA MARIE PIERCE thereafter ordered hydriodic acid from Calabrian International, Inc. (hereinafter "Calabrian"), a chemical manufacturing and distribution company, on behalf of AAA Minerals. Defendant DEANNA MARIE PIERCE wire transferred the funds for the hydriodic acid purchases from the Texas bank accounts that she controlled to Calabrian, and requested shipment either to a warehouse facility in Texas or to warehouse facilities within the Central District of California. All of the hydriotic acid solution ultimately was to be transported to San Bernardino County, California.

3. Defendants CHARLES WESLEY ARLT, JAMES ELI WREN, ROBERT KUHNLE, and an unindicted co-conspirator accepted delivery of the hydriodic acid in San Bernardino County California. Defendants CHARLES WESLEY ARLT, JAMES ELI WREN, ROBERT KUHNLE, and an unindicted co-conspirator then transported the hydriodic acid to Highland Towing Company (hereinafter "Highland Towing"), a towing business owned by defendant

CHARLES WESLEY ARLT, located in Highland, California. While at Highland Towing, unknown individuals scraped the labels and stencils that identified the contents of the drums as hydriodic acid from the drums in order to avoid detection by law enforcement.

4. Defendants ROBERT KUHNLE and JAMES ELI WREN transported hydriodic acid from Highland Towing to ANITA GAGE and others, who took possession of the hydriodic acid. The hydriodic acid was to be used to manufacture methamphetamine.

5. Defendant ANITA GAGE located individuals to purchase the hydriodic acid, and distributed the hydriodic acid to those individuals. Those individuals then manufactured and attempted to manufacture methamphetamine with the hydriodic acid. Defendant ANITA GAGE accepted United States currency and methamphetamine in exchange for the hydriodic acid, and in turn sold the methamphetamine for United States currency.

6. Defendants CHARLES WESLEY ARLT and DARYLE EUGENE HOUSE purchased and took delivery of red phosphorous, a chemical used to manufacture methamphetamine. Defendants CHARLES WESLEY ARLT and DARYLE EUGENE HOUSE further distributed the red phosphorous to individuals who manufactured or intended to manufacture methamphetamine with it.

7. Defendant JAMES ROCKY HILL arranged for the delivery of hydriodic acid and red phosphorous to other co-conspirators, provided security to the co-conspirators, and took custody of monies generated by and for the conspiracy.

III. *OVERT ACTS*

In furtherance of the conspiracy and to accomplish the objects of the conspiracy, defendants and others committed various overt acts within the Central District of California and elsewhere, including but not limited to the following:

1. On or about January 17, 1989, defendant CHARLES WESLEY ARLT purchased approximately 10 pounds of red phosphorous, a chemical used in the production of methamphetamine, from Chem Lab Supplies, Placentia, California.

2. On or about October 26, 1989, defendant CHARLES WESLEY ARLT purchased approximately 13 pounds of lidocaine, a chemical used to dilute or "cut" methamphetamine, from Chem Lab Supplies, Placentia, California.

3. On or about November 1, 1989, Defendant CHARLES WESLEY ARLT purchased approximately 10 gallons of hydriodic acid and other chemicals and apparatus used in the production of methamphetamine from Chem Lab Supplies, Placentia, California.

4. In or about December 1989, defendant CHARLES WESLEY ARLT and an unindicted co-conspirator purchased hydrochloric acid and four pumps at Chem Lab Supplies, Placentia, California.

5. On or about January 25, 1990, defendant CHARLES WESLEY ARLT purchased approximately 10 pounds of red phosphorous, a chemical used in the production of methamphetamine, from Chem Lab Supplies, Placentia, California.

6. On or about February 2, 1990, an unindicted co-conspirator ordered approximately 2,800 pounds of hydriodic acid solution costing approximately

$23,800, from Calabrian, to be available for customer pick up in Texas on or about February 12, 1990. This order was later changed to 4,000 pounds of hydriodic acid solution, costing approximately $33,000.

7. In or about February 1990, defendant ANITA GAGE carried approximately $30,000 in United States currency from the Central District of California to Texas, to be used for the purchase of hydriodic acid solution.

8. On or about February 9, 1990, defendant DEANNA MARIE PIERCE purchased a cashier's check with United States currency at Texas Commerce Bank in the amount of $33,000, made payable to Calabrian.

9. In or about February 1990, defendants CHARLES WESLEY ARLT and ANITA GAGE travelled from the Central District of California to Texas, for the purpose of taking delivery of hydriodic acid solution.

10. On or about February 12, 1990, defendant CHARLES WESLEY ARLT picked up approximately 4,000 pounds of hydriodic acid solution from Calabrian's facility in Port Neches, Texas.

11. On or about February 15, 1990, defendant DEANNA MARIE PIERCE ordered approximately 4,000 pounds of hydriodic acid solution costing approximately $33,000 plus shipping, from Calabrian, to be delivered on or about February 22, 1990 to a warehouse facility located at 209 South Friendswood Drive, Friendswood, Texas.

12. On or about February 20, 1990, defendant DEANNA MARIE PIERCE purchased a cashier's check with United States currency at Texas Commerce Bank in the amount of $33,157.62, made payable to Calabrian.

13. On or about February 22, 1990, at a warehouse facility at 209 South Friendswood Drive, Friendswood, Texas, defendant CHARLES WESLEY ARLT took delivery of approximately 4,000 pounds (eight 55-gallon drums) of hydriodic acid solution which had been shipped from Calabrian.

14. On or about February 23, 1990, defendant DEANNA MARIE PIERCE ordered approximately 4,000 pounds of hydriodic acid solution costing approximately $33,000 plus shipping, from Calabrian, to be delivered on or about March 12, 1990 to a warehouse facility located at 209 South Friendswood Drive, Friendswood, Texas.

15. On or about March 14, 1990, defendant DEANNA MARIE PIERCE wire transferred approximately $33,000 from Community National Bank in Friendswood, Texas, to Calabrian's bank account at National Westminster Bank, New Jersey.

16. In or about April, 1990, defendants CHARLES WESLEY ARLT and JAMES ELI WREN purchased and took delivery of approximately 500 pounds of red phosphorous from Great Lakes Chemical Company, Melrose Park, Illinois.

17. On or about April 16, 1990, defendant DEANNA MARIE PIERCE ordered approximately 8,000 pounds of hydriodic acid solution costing approximately $66,000, from Calabrian, to be picked up during the week of April 23, 1990. This order was later changed to authorize delivery via common carrier on or about May 8, 1990 to a warehouse facility located at 209 South Friendswood Drive, Friendswood, Texas.

18. On or about May 2, 1990, defendant CHARLES WESLEY ARLT deposited approximately $65,770 in United States currency into a bank account at Community National Bank, Friendswood, Texas.

19. On or about May 2, 1990, defendant CHARLES WESLEY ARLT wire transferred approximately $65,760 from Community National Bank, Friendswood, Texas, to Calabrian's bank account at National Westminster Bank, New Jersey.

20. On or about May 9, 1990, defendant DEANNA MARIE PIERCE caused the delivery of approximately 8,000 pounds of hydriodic acid solution to a warehouse facility located at 209 South Friendswood Drive, Friendswood, Texas.

21. On or about June 26, 1990, defendant CHARLES WESLEY ARLT purchased a cashier's check with United States currency at the Bank of San Bernardino, San Bernardino, California, in the amount of $35,000, made payable to AAA Minerals, with the purchaser listed as "OMNI MINING—C.W. ARLT."

22. On or about June 28, 1990, defendant DEANNA MARIE PIERCE ordered approximately 4,000 pounds of hydriodic acid solution costing approximately $33,000, from Calabrian, to be delivered on or about July 5, 1990 to a warehouse facility located at 424-A East Rialto Avenue, San Bernardino, California.

23. On or about June 28, 1990, defendant DEANNA MARIE PIERCE caused a cashier's check in the amount of $35,000, with the purchaser listed as "OMNI MINING—C.W. ARLT," to be delivered to Calabrian, in payment for 4,000 pounds of hydriodic acid.

24. On or about July 7, 1990, at the Consolidated Freightways terminal in San Bernardino County, California, defendant CHARLES WESLEY ARLT took delivery of approximately 4,000 pounds (eight 55-gallon drums) of hydriodic acid solution which had been shipped from Calabrian to AAA Minerals.

25. On or about July 16, 1990, defendant DEANNA MARIE PIERCE ordered approximately 4,800 pounds of hydriodic solution costing approximately $34,080, from Calabrian, to be delivered on or about July 21, 1990 to a warehouse facility located at 424-A East Rialto Avenue, San Bernardino, California.

26. On or about July 16, 1990, defendant CHARLES WESLEY ARLT wire transferred approximately $45,000 from Bank of San Bernardino, San Bernardino, California to a bank account at Texas Commerce Bank controlled by defendant DEANNA MARIE PIERCE.

27. On or about July 16, 1990, defendant DEANNA MARIE PIERCE wire transferred approximately $34,637 from a bank account at Texas Commerce Bank to Calabrian's bank account at National Westminster Bank, New Jersey.

28. On or about July 25, 1990, at this Consolidated Freightways terminal in San Bernardino County, California, defendant JAMES ELI WREN took delivery of approximately 4,800 pounds (eight 55-gallon drums) of hydriodic acid solution which had been shipped from Calabrian to AAA Minerals.

29. On or about August 1, 1990, defendant DEANNA MARIE PIERCE ordered approximately 4,800 pounds of hydriodic acid solution costing approximately $34,080 plus shipping from Calabrian, to be ready for delivery on or about August 8, 1990

to a warehouse facility located at 424-A East Rialto Avenue, San Bernardino, California.

30. On or about August 1, 1990, defendant CHARLES WESLEY ARLT deposited approximately $39,007 in United States currency into a bank account at the Bank of San Bernardino.

31. On or about August 1, 1990, defendant CHARLES WESLEY ARLT wire transferred approximately $35,000 from the Bank of San Bernardino to a bank account at the First Bank of Deerpark, Texas, controlled by defendant DEANNA MARIE PIERCE.

32. On or about August 2, 1990, defendant DEANNA MARIE PIERCE wire transferred approximately $34,637 from the First Bank of Deerpark to Calabrian's bank account at National Westminster Bank, New Jersey.

33. On or about August 8, 1990, defendant CHARLES WESLEY ARLT purchased Highland Towing Company, 27110 East Third Street, San Bernardino, California.

34. On or about August 10, 1990, defendant JAMES ELI WREN rented unit A-19 at a warehouse facility located at 1180 East Ninth Street, San Bernardino, California.

35. On or about August 21, 1990, defendant CHARLES WESLEY ARLT ordered 700 pounds of red phosphorous costing $2,975, from Great Lakes Chemical Company, Melrose Park, Illinois.

36. On or about August 21, 1990, defendant JAMES ELI WREN deposited $10,605 in United States currency into a bank account at the Bank of San Bernardino.

37. On or about August 21, 1990, defendant JAMES ELI WREN wire transferred approximately

$2,975 from a bank account at the Bank of San Bernardino to Great Lakes Chemical Company's bank account in Melrose Park, Illinois.

38. On or about August 27, 1990, defendant DEANNA MARIE PIERCE ordered approximately 9,600 pounds of hydriodic acid solution costing approximately $67,200 plus shipping from Calabrian, to be delivered on or about September 5, 1990 to a warehouse facility located at 424-A East Rialto Avenue, San Bernardino, California.

39. On or about August 27, 1990, defendant JAMES ELI WREN deposited approximately $71,000 in United States currency into a bank account at the Bank of San Bernardino.

40. On or about August 27, 1990, defendant JAMES ELI WREN wire transferred approximately $71,000 from a bank account at the Bank of San Bernardino to a bank account at the First Bank of Deerpark controlled by defendant DEANNA MARIE PIERCE.

41. On or about August 27, 1990, defendant DEANNA MARIE PIERCE wire transferred approximately $68,315 from the First Bank of Deerpark to Calabrian's bank account at National Westminster Bank, New Jersey.

42. On or about August 30, 1990, defendant CHARLES WESLEY ARLT took delivery of approximately 700 pounds of red phosphorous at a warehouse facility located at 422-A East Rialto Avenue, San Bernardino, California.

43. On or about September 8, 1990, at the Consolidated Freightways terminal in San Bernardino County, California, defendant JAMES ELI WREN took delivery of approximately 9,600 pounds (sixteen

55-gallon drugs) of hydriodic acid solution which had been shipped from Calabrian to AAA Minerals.

44. On or about September 14, 1990, defendant CHARLES WESLEY ARLT purchased, with $130,000 in United States currency, a 160-acre parcel of property in Oceola, Nevada, commonly known as the Old Marriott Ranch.

45. On or about October 8, 1990, defendant DEANNA MARIE PIERCE ordered approximately 5,216 pounds of hydriodic acid solution costing approximately $37,503.04, from Calabrian, to be delivered on or about October 15, 1990 to a warehouse facility located at 424-A East Rialto Avenue, San Bernardino, California.

46. On or about October 10, 1990, defendant JAMES ELI WREN deposited $42,600 in United States currency into a bank account at the Bank of San Bernardino.

47. On or about October 10, 1990, defendant JAMES ELI WREN wire transferred approximately $38,000 from the Bank of San Bernardino to a bank account at the First Bank of Deerpark controlled by defendant DEANNA MARIE PIERCE.

48. On or about October 10, 1990, defendant DEANNA MARIE PIERCE wire transferred approximately $36,021 from the First Bank of Deerpark to Calabrian's bank account at National Westminster Bank, New Jersey.

49. On or about October 15, 1990, at the Consolidated Freightways terminal in San Bernardino County, California, defendant JAMES ELI WREN took delivery of approximately 5,216 pounds (eight 55-gallon drums) of hydriodic acid solution which had been shipped from Calabrian to AAA Minerals.

50. On or about November 5, 1990, defendant DEANNA MARIE PIERCE ordered approximately 5,216 pounds of hydriodic acid solution costing approximately $37,503.04, from Calabrian, to be delivered on or about November 12, 1990 to a warehouse facility located at 424-A East Rialto Avenue, San Bernardino, California.

51. On or about November 5, 1990, defendant JAMES ELI WREN deposited approximately $40,000 in United States currency into a bank account at the Bank of San Bernardino.

52. On or about November 5, 1990, defendant JAMES ELI WREN wire transferred approximately $40,000 to a bank account at the First Bank of Deerpark controlled by defendant DEANNA MARIE PIERCE.

53. On or about November 5, 1990, defendant DEANNA MARIE PIERCE wire transferred approximately $36,981 from the First Bank of Deerpark to Calabrian's bank account at National Westminster Bank, New Jersey.

54. On or about November 11, 1990, at the Consolidated Freightways terminal in San Bernardino County, California, defendant CHARLES WESLEY ARLT took delivery of approximately 5,216 pounds (eight 55-gallon drums) of hydriodic acid solution which had been shipped from Calabrian to AAA Minerals.

55. On or about November 8, 1990, defendant JAMES ELI WREN purchased a cashier's check with United States currency in the amount of $200,000, made payable to defendant CHARLES WESLEY ARLT.

56. On or about November 9, 1990, defendant CHARLES WESLEY ARLT endorsed a $200,000

cashier's check and delivered it to Unibank, New York, depositing the funds into a bank account there.

57. On or about November 9, 1990, defendant CHARLES WESLEY ARLT instructed Unibank, New York, to forward $200,000 to a bank account at Unibank, Luxembourg controlled by defendant CHARLES WESLEY ARLT and two unindicted co-conspirators.

58. On or about November 27, 1990, an unindicted co-conspirator deposited $47,069 in United States currency into a bank account at the Bank of San Bernardino.

59. On or about November 27, 1990, an unindicted co-conspirator wire transferred approximately $40,000 from the Bank of San Bernardino to a bank account at the First Bank of Deerpark controlled by defendant DEANNA MARIE PIERCE.

60. On or about November 28, 1990, defendant DEANNA MARIE PIERCE ordered approximately 5,216 pounds of hydriodic acid solution costing approximately $36,981, from Calabrian, to be delivered "as soon as possible" to a warehouse facility located at 424-A East Rialto Avenue, San Bernardino, California.

61. On or about November 28, 1990, defendant DEANNA MARIE PIERCE wire transferred approximately $36,981 from the First Bank of Deerpark to Calabrian's bank account at National Westminster Bank, New Jersey.

62. On or about November 29, 1990, defendant DEANNA MARIE PIERCE ordered approximately 5,216 pounds of hydriodic acid solution costing approximately $37,503, from Calabrian, to be delivered on or about December 3, 1990, to a warehouse facility

located at 424-A East Rialto Avenue, San Bernardino, California.

63. On or about December 2, 1990, defendant JAMES ELI WREN rented unit A-10 at a warehouse facility located at 1180 East Ninth Street, San Bernardino, California.

64. On or about December 3, 1990, at the Consolidated Freightways terminal in San Bernardino County, California, defendant ROBERT KUHNLE took delivery of approximately 5,216 pounds (eight 55-gallon drums) of hydriodic acid solution which had been shipped from Calabrian to AAA Minerals.

65. On or about December 3, 1990, defendant CHARLES WESLEY ARLT purchased the following ammunition at a sporting goods store in Ely, Nevada: two boxes of .38 caliber ammunition, four boxes of .44 magnum ammunition, two boxes of .30 caliber carbine ammunition, four boxes of shotgun shells, and two boxes of .380 ammunition.

66. On or about December 14, 1990, defendant DEANNA MARIE PIERCE changed her order of November 29, 1990 with Calabrian from 5,216 pounds to approximately 10,432 pounds of hydriodic acid solution costing approximately $73,962, to be shipped to a warehouse facility located at 424-A East Rialto Avenue, San Bernardino, California.

67. On or about December 14, 1990, defendant JAMES ELI WREN wire transferred approximately $80,000 from the Bank of San Bernardino to a bank account at the First Bank of Deerpark controlled by defendant DEANNA MARIE PIERCE.

68. On or about December 14, 1990, defendant DEANNA MARIE PIERCE wire transferred approximately $73,962 from the First Bank of Deer-

park to Calabrian's bank account at National Westminster Bank, New Jersey.

69. On or about December 20, 1990, at the Consolidated Freightways terminal in San Bernardino County, California, defendant ROBERT KUHNLE took delivery of approximately 10,432 pounds (sixteen 55-gallon drums) of hydriodic acid solution which had been shipped from Calabrian to AAA Minerals.

70. On or about January 25, 1991, defendant DEANNA MARIE PIERCE ordered approximately 10,432 pounds of hydriodic acid solution costing approximately $73,962, from Calabrian, to be delivered on or about January 30, 1991, to the Consolidated Freightways terminal, San Bernardino County, California.

71. On or about January 25, 1991, defendant JAMES ELI WREN deposited $80,000 in United States currency into a bank account at the Bank of San Bernardino.

72. On or about January 25, 1991, defendant JAMES ELI WREN wire transferred approximately $80,000 from the Bank of San Bernardino to a bank account at the First Bank of Deerpark controlled by defendant DEANNA MARIE PIERCE.

73. On or about January 25, 1991, defendant DEANNA MARIE PIERCE wire transferred approximately $73,962 from the First Bank of Deerpark to Calabrian's bank account at National Westminster Bank, New Jersey.

74. On or about February 5, 1991, at the Consolidated Freightways terminal in San Bernardino County, California, defendant ROBERT KUHNLE took delivery of approximately 5,216 pounds (eight

55-gallon drums) of hydriodic acid solution which had been shipped from Calabrian to AAA Minerals.

75. On or about February 8, 1991, at the Consolidated Freightways terminal in San Bernardino County, California, defendant ROBERT KUHNLE took delivery of approximately 5,216 pounds (eight 55-gallon drums) of hydriodic acid solution which had been shipped by Calabrian to AAA Minerals.

76. On or about February 12, 1991, defendant JAMES ELI WREN distributed two 55-gallon drums of hydrodic acid solution in the parking lot of the Comfort Inn, San Bernardino, California.

77. On or about February 12, 1991, defendant DEANNA MARIE PIERCE ordered approximately 10,432 pounds (sixteen 55-gallon drums) of hydriodic acid solution costing approximately $74,453, from Calabrian, to be delivered "as soon as possible" to the Consolidated Freightways terminal, San Bernardino County, California.

78. On or about February 12, 1991, defendants CHARLES WESLEY ARLT and JAMES ELI WREN deposited approximately $80,000 in United States currency into a bank account at the Security Pacific National Bank, San Bernardino, California.

79. On or about February 12, 1991, defendants CHARLES WESLEY ARLT and JAMES ELI WREN wire transferred approximately $80,000 from the Security Pacific National Bank to a bank account at the First Bank of Deerpark controlled by defendant DEANNA MARIE PIERCE.

80. On or about February 13, 1991, following several seizures by law enforcement officers of methamphetamine, chemicals and equipment used in the manufacture of methamphetamine, and large quantities of United States currency, defendant DEANNA

MARIE PIERCE telephoned Calabrian and requested that her order of 10,432 pounds of hydriodic acid solution be placed "on hold," stating that there had been "an accident in the mines."

81. On or about February 19, 1991, defendant JAMES ROCKY HILL arranged for the delivery of approximately 3,000 pounds of red phosphorous to defendant DARYLE EUGENE HOUSE at 56024 Tracy Boulevard, Yucca Valley, California.

82. On or about February 20, 1991, defendant DARYLE EUGENE HOUSE took delivery of approximately 3,000 pounds of red phosphorous at his residence located at 56024 Tracy Boulevard, Yucca Valley, California.

83. On or about February 20, 1991, defendant JAMES ROCKY HILL arranged for the transport of the approximately 3,000 pounds of red phosphorous to a remote mine site near Daggett, California.

84. On or about February 21, 1991, defendant JAMES ELI WREN transported in excess of $123,000 in United States currency from Security Pacific National Bank, San Bernardino, California, to Mayhill Bail Bonds, San Bernardino, California.

85. On or about February 22, 1991, defendant CHARLES WESLEY ARLT purchased a cashier's check with United States currency at the Bank of America in the amount of $200,000, made payable to Unibank.

86. On or about March 21, 1991, defendant JAMES ROCKY HILL possessed approximately $400,000 in his savings account at the Security Pacific National Bank, Rubidoux Branch, 5694 Mission Boulevard, Riverside, California.

87. On or about March 21, 1991, defendant JAMES ROCKY HILL made arrangements with

Security Pacific National Bank to withdraw $400,000 from his savings account in United States currency on March 29, 1991.

88. On or about March 29, 1991, defendant DARYLE EUGENE HOUSE possessed formulas detailing methods of manufacturing methamphetamine at his residence located on Tracy Boulevard in Yucca Valley, California.

89. On or about March 29, 1991, defendants CHARLES WESLEY ARLT, DARYLE EUGENE HOUSE, and ROBERT KUHNLE possessed a formula detailing a method of manufacturing methamphetamine at defendant CHARLES WESLEY ARLT'S ranch house, located at the Old Marriott Ranch, Oceola, Nevada.

90. On or about March 29, 1991, defendants CHARLES WESLEY ARLT, DARYLE EUGENE HOUSE, and ROBERT KUHNLE possessed approximately 41 firearms at defendant CHARLES WESLEY ARLT'S ranch house, located at the Old Marriott Ranch, Oceola, Nevada.

91. On or about March 29, 1991, defendants CHARLES WESLEY ARLT, DARYLE EUGENE HOUSE, and ROBERT KUHNLE possessed hydriodic acid at defendant CHARLES WESLEY ARLT'S ranch house, located at the Old Marriott Ranch, Oceola, Nevada.

92. On or about March 29, 1991, defendant CHARLES WESLEY ARLT possessed approximately 29 110-pound containers of red phosphorous on a mine site located in a remote area near Daggett, California.

COUNT TWO

[18 U.S.C. §§ 371, 1956(a)(1)]

I. *OBJECT OF THE CONSPIRACY*

Beginning on a date unknown to the Grand Jury and continuing to on or about March 29, 1991, within the Central District of California and elsewhere, defendants CHARLES WESLEY ARLT, JAMES ELI WREN, DEANNA MARIE PIERCE, JAMES ROCKY HILL, and others both known and unknown to the Grand Jury, knowingly and willfully conspired and agreed with each other to commit the following offense against the United States:

1. To knowingly and intentionally launder monetary instruments, in violation of Title 18, United States Code, Sections 371 and 1956.

II. *MEANS BY WHICH THE OBJECT OF THE CONSPIRACY WAS TO BE ACCOMPLISHED*

The object of the conspiracy was to be accomplished in substance as follows:

1. The means alleged in Count One of this indictment, as set forth at paragraphs 1 to 7 of the means relating to Count One, are incorporated herein by reference and alleged as the means of this count.

III. *OVERT ACTS*

In furtherance of the conspiracy and to accomplish the object of the conspiracy, defendants CHARLES WESLEY ARLT, JAMES ELI WREN, DEANNA MARIE PIERCE, JAMES ROCKY HILL, and others both known and unknown to the Grand Jury, committed various overt acts within the Central District of California and elsewhere, including but not limited to the following:

1. The overt acts alleged in Count One of this indictment, as set forth at paragraphs 1 through 92 of the overt acts relating to Count One, are incorporated herein by reference and are alleged as overt acts 1 to 92 of this count.

COUNTS THREE AND FOUR

[18 U.S.C. §§ 2, 1956(a)(1)]

On or about the dates listed below, in San Bernardino County, within the Central District of California, defendant CHARLES WESLEY ARLT aided, abetted, counselled, commanded, induced, procured, and caused financial transactions involving the proceeds of felonious buying, selling, and dealing in controlled substances and listed chemicals, with the intent to promote the carrying on of said unlawful activity, and knowing that the transactions were designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of such proceeds, in that defendant CHARLES WESLEY ARLT provided defendant DEANNA MARIE PIERCE with United States currency, who in turn wire transferred the amounts listed below from bank accounts in Texas to Calabrian's bank account at National Westminster Bank in New Jersey. At said times and places, defendant CHARLES WESLEY ARLT knew that said amounts of United States curdency represented the proceeds of some form of unlawful activity.

Count	Date	Wire Transfer to Calabrian From	Amount
3	July 16, 1990	Texas Commerce Bank	$34,637
4	August 2, 1990	First Bank of Deerpark	$34,637

COUNTS FIVE THROUGH NINE

[18 U.S.C. §§ 2, 1956(a)(1)]

On or about the dates listed below, in San Bernardino County, within the Central District of California, defendants CHARLES WESLEY ARLT and JAMES ELI WREN aided, abetted, counselled, commanded, induced, procured, and caused financial transactions involving the proceeds of felonious buying, selling, and dealing in controlled substances and listed chemicals, with the intent to promote the carrying on of said unlawful activity, and knowing that the transactions were designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of such proceeds, in that defendants CHARLES WESLEY ARLT and JAMES ELI WREN provided defendant DEANNA MARIE PIERCE with United States currency, who in turn wire transferred the amounts listed below from a bank account at the First Bank of Deerpark in Texas to Calabrian's bank account at National Westminster Bank in New Jersey. At said times and places, defendants CHARLES WESLEY ARLT and JAMES ELI WREN knew that said amounts of United States currency represented the proceeds of some form of unlawful activity.

Count	Date	Amount
5	August 27, 1990	$68,315
6	October 10, 1990	$36,021
7	November 5, 1990	$36,981
8	December 14, 1990	$73,962
9	January 25, 1991	$73,962

COUNTS TEN AND ELEVEN

[18 U.S.C. §§ 2, 1956(a)(1)]

On or about the dates listed below, in San Bernardino County, within the Central District of California, defendant CHARLES WESLEY ARLT conducted financial transactions involving the proceeds of felonious buying, selling, and dealing in controlled substances and listed chemicals, with the intent to promote the carrying on of said unlawful activity, and knowing that the transactions were designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of such proceeds, in that defendant CHARLES WESLEY ARLT wire transferred the amounts of United States currency listed below from bank accounts at the Bank of San Bernardino, within the Central District of California, to bank accounts in Texas controlled by defendant DEANNA MARIE PIERCE. At said times and places, defendant CHARLES WESLEY ARLT knew that said amounts of United States currency represented the proceeds of some form of unlawful activity.

Count	Date	Amount
10	July 16, 1990	$45,000
11	August 1, 1990	$35,000

COUNTS TWELVE THROUGH SEVENTEEN

[18 U.S.C. § 1956(a)(1)]

On or about the dates listed below, in San Bernardino County, within the Central District of California, defendant JAMES ELI WREN conducted financial transactions involving the proceeds of felonious buying, selling, and dealing in controlled substances

and listed chemicals, with the intent to promote the carrying on of said unlawful activity, and knowing that the transactions were designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of such proceeds, in that defendant JAMES ELI WREN wire transferred the amounts of United States currency listed below from bank accounts at banks within the Central District of California to bank accounts in Texas controlled by defendant DEANNA MARIE PIERCE. At said times and places, defendant JAMES ELI WREN knew that said amounts of United States currency represented the proceeds of some form of unlawful activity.

At said times and places, defendant CHARLES WESLEY ARLT aid, abetted, counselled, commanded, induced, procured and caused those offenses.

Count	Date	Bank From Which Funds Were Transferred	Amount
12	August 27, 1990	Bank of San Bernardino	$71,000
13	October 10, 1990	Bank of San Bernardino	$38,000
14	November 5, 1990	Bank of San Bernardino	$40,000
15	December 14, 1990	Bank of San Bernardino	$80,000
16	January 25, 1991	Bank of San Bernardino	$80,000
17	February 12, 1991	Security Pacific National Bank	$80,000

COUNT EIGHTEEN

[18 U.S.C. § 1956(a)(1)]

On or about June 26, 1990, in San Bernardino County, within the Central District of California, defendant CHARLES WESLEY ARLT conducted a financial transaction involving the proceeds of felonious buying, selling, and dealing in controlled substances and listed chemicals, with the intent to promote the carrying on of said unlawful activity, and knowing that the transaction was designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of such proceeds, in that defendant CHARLES WESLEY ARLT purchased a cashier's check in the amount of approximately $35,000 at the Bank of San Bernardino, within the Central District of California, to be used for the purchase of chemicals from Calabrian. At said time and place, defendant CHARLES WESLEY ARLT knew that said amount of United States currency represented the proceeds of some form of unlawful activity.

COUNT NINETEEN

[18 U.S.C. § 1956(a)(1)]

On or about August 21, 1990, in San Bernardino County, within the Central District of California, defendant JAMES ELI WREN conducted a financial transaction involving the proceeds of felonious buying, selling, and dealing in controlled substances and listed chemicals, with the intent to promote the carrying on of said unlawful activity, in that defendant JAMES ELI WREN wire transferred approximately $2,975 in United States currency from a bank account at the Bank of San Bernardino, within the Central District of California, to Great Lakes Chemical Company's bank account in Melrose Park, Illinois. At said time and place, defendant JAMES ELI WREN knew that said amount of United States currency represented the proceeds of some form of unlawful activity.

COUNT TWENTY

[18 U.S.C. § 1956(a)(1)]

On or about November 8, 1990, in San Bernardino County, within the Central District of California, defendant JAMES ELI WREN conducted a financial transaction involving the proceeds of felonious buying, selling, and dealing in controlled substances and listed chemicals, knowing that the transaction was designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of such proceeds, in that defendant JAMES ELI WREN purchased a cashier's check in the amount of $200,000 at the Bank of San Bernardino. At said time and place, defendant JAMES ELI WREN knew that said amount of United States currency represented the proceeds of some form of unlawful activity.

COUNT TWENTY ONE

[18 U.S.C. § 1956(a)(1)]

On or about February 22, 1991, in San Bernardino County, within the Central District of California, defendant CHARLES WESLEY ARLT conducted a financial transaction involving the proceeds of felonious buying, selling, and dealing in controlled substances and listed chemicals, knowing that the transaction was designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of such proceeds, in that defendant CHARLES WESLEY ARLT purchased a cashier's check in the amount of $200,000 at the Bank of America. At said time and place, defendant CHARLES WESLEY ARLT knew that said amount of United

States currency represented the proceeds of some form of unlawful activity.

COUNT TWENTY TWO

[18 U.S.C. § 1956(a)(1)]

On or about March 21, 1991, in Riverside County, within the Central District of California, defendant JAMES ROCKY HILL attempted to conduct a financial transaction involving the proceeds of felonious buying, selling, and dealing in controlled substances and listed chemicals, knowing that the transaction was designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of such proceeds, in that defendant JAMES ROCKY HILL attempted to withdraw approximately $400,000 from his bank account at Security Pacific National Bank, Riverside, California. At said time and place, defendant JAMES ROCKY HILL knew that said amount of United States currency represented the proceeds of some form of unlawful activity.

A TRUE BILL

_____

Foreperson

LOURDES G. BAIRD
United States Attorney

ROBERT L. BROSIO
Assistant United States Attorney
Chief, Criminal Division

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Docket No. CR-91-329 (A) DT

Social Security No. 462-71-4157 and 462-74-4137

UNITED STATES OF AMERICA

vs.

CHARLES WESLEY ARLT

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date

ENTERED July 13, 1992

☐ WITHOUT COUNSEL However, the Court advised defendant of right to counsel and asked whether defendant desired have counsel appointed by the Court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL Lydia Sanchez, retained
(Name of Counsel)

☐ GUILTY, and the Court being satisfied that there is a factual basis for the plea. ☐ NOLO CONTENDERE ☒ NOT GUILTY

There being a verdict of ☒ GUILTY, defendant has been convicted as charged of the offense(s) of

conspiracy to aid and abet the manufacture of methamphetamine, conspiracy to launder monetary instruments, laundering of monetary instruments, and aid and abetting and causing an act to be done, in violation of Title 21, United States Code, Sections 846, 841(a)(1), Title 18, United States Code, Sections 371, 1956; 1956 (a)(1), and 2, as charged in Counts 1 through 18 and 21, of the 1st Superseding Indictment.

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed the custody of the Bureau of Prisons to be imprisoned for a term of: life imprisonment as to Counts 1 through 18 and 21 of the 1st Superseding Indictment. This term consists of life imprisonment on Count One and 60 months on each of Counts 2-18 & 21, all to be served concurrently. Defendant is to pay a fine to the United States in the amount of $250,000.00. If the defendant is released from confinement, he is placed on supervised release for a period of 10 years. This term of supervised release consists of 10 years on Count 1 and 3 years on each of Counts 2-18 and 21, all such terms to run concurrently. The defendant is placed on supervised release upon the following terms and conditions that he shall: (1) comply with the rules and regulations of the Probation Office and General Order 318; and (2) pay any fine herein imposed by this judgment and that remains unpaid at the commencement of the

term of community supervision as directed by the Probation Office.

THE COURT ORDERS the underlying Indictment dismissed.

THE COURT NOTIFIES the defendant of his rights on appeal and denies defendant's request for stay of execution of sentence.

In addition to the special conditions of supervision, imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised release set out on the reverse side of this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

☐ This is a direct commitment to the Bureau of Prisons, and the Court has NO OBJECTION should the Bureau of Prisons designate defendant to a Community Corrections Center.

Signed By: ☒ U.S. District Judge Dickran Tevrizian
It is ordered that the Clerk deliver a certified copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Dated/Filed/7/15/92

LEONARD A. BROSNAN
Clerk

APPENDIX I

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Docket No. CR-91-329 (A) DT
Social Security No. 428-62-7760

UNITED STATES OF AMERICA

vs.

JAMES ELI WREN

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date.

July 13, 1992

☐ WITHOUT COUNSEL However, the Court advised defendant of right to counsel and asked whether defendant desired have counsel appointed by the Court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL Dennis Palmieri, retained
(Name of Counsel)

☐ GUILTY, and the Court being satisfied that there is a factual basis for the plea. ☐ NOLO CONTENDERE ☒ NOT GUILTY.

There being a verdict of ☒ GUILTY, defendant has been convicted as charged of the offense(s) of: conspiracy to aid and abet the manufacture of methamphetamine, conspiracy to launder monetary instruments, laundering of monetary instruments, and aiding and abetting and causing an act to be done, in violation of Title 21, United States Code, Sections 846, 841(a)(1), Title 18, United States Code, Sections 371, 1956, 1956(a)(1), and 2, as charged in Counts 1,2,5,6,7,8,9,12,1314,15,16,17,19 and 20 of the 1st Superseding Indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of: life imprisonment as to Counts One, 2, 5-9, 12-17, 19 and 20 of the 1st Superseding Indictment. This term consists of life imprisonment on Count One and 60 months on each of Counts 2, 5-9, 12-17, 19 and 20, all to be served concurrently. If the defendant is released from confinement, he is placed on supervised release for a period of five years. This term of supervised release consists of 5 years on Count 1 and 3 years on each of Counts 2, 5-9, 12-17, 19 and 20, all such terms to run concurrently. The defendant is placed on supervision upon the following terms and conditions that he shall: (1) comply with the rules and regulations of the Probation Office and General Order 318; and (2) pay a special assessment to the United States in the amount of $750.00.

THE COURT ORDERS the underlying Indictment dismissed.

THE COURT NOTIFIES the defendant of his rights on appeal and denies defendant's request for stay of execution of sentence.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervisory release set out on the reverse side of this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

☐ This is a direct commitement to the Bureau of Prisons, and the Court has NO OBJECTION should the Bureau of Prisons designate defendants to a Community Corrections Center.

Signed By: ☒ U.S. District Judge Dickran Tevrizian
It is ordered that the Clerk deliver a certified copy of this judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Dated/Filed/7/15/92

LEONARD A. BROSNAN
Clerk

APPENDIX J

The Fifth Amendment to the Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 371 of Title 18, United States Code, provides:

> **Conspiracy to Commit offense or to defraud United States**
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Section 981 of Title 18, United States Code, provides:

> **Civil forfeiture**
>
> (a)(1) Except as provided in paragraph (2), the following property is subject to forfeiture to the United States:
>
> (A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5313(a) or 5324(a) of title 31, or of section 1956 or 1957 of this title, or any property traceable to such property. However, no property shall be seized or forfeited in the case of a violation of section 513(a) of title 31 by a domestic financial institution examined by a Federal bank supervisory agency or a financial institution regulated by the Securities and Exchange Commission or a partner, director, or employee thereof.
>
> (B) Any property, real or personal, within the jurisdiction of the United States, constituting, derived from or traceable to, any proceeds obtained directly or indirectly from an offense against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act), within whose jurisdiction such offense would be punishable by death or imprisonment for a term exceeding one year and which would be punishable under the laws of the United States by imprisonment for a term exceed-

ing one year if such act or activity constituting the offense against the foreign nation had occurred within the jurisdiction of the United States.

(C) Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of section 215, 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 656, 657, 842, 844, 1005, 1006, 1007, 1014, 1028, 1029, 1030, 1032, or 1344 of this title or a violation of section 1341 or 1343 of such title affecting a financial institution.

(D) Any property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly from a violation of—

(i) Section 666(a)(1) (relating to Federal program fraud);

(ii) section 1001 (relating to fraud and false statements);

(iii) section 1031 (relating to major fraud against the United States);

(iv) section 1032 (relating to concealment of assets from conservator or receiver of insured financial institution);

(v) section 1341 (relating to mail fraud); or

(vi) section 1343 (relating to wire fraud),

if such violation relates to the sale of assets acquired or held by the Resolution Trust

Corporation, the Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution, or any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency or the Office of Thrift Supervision or the National Credit Union Administration, as conservator or liquidating agent for a financial institution.

(E) With respect to an offense listed in subsection (a)(1)(D) committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations or promises, the gross receipts of such an offense shall include all property, real or personal, tangible or intangible, which thereby is obtained, directly or indirectly.

(F) Any property, real or personal, which represents or is traceable to the gross proceeds obtained, directly or indirectly, from a violation of—

(i) section 511 (altering or removing motor vehicle identification numbers);

(ii) section 553 (importing or exporting stolen motor vehicles);

(iii) section 2119 (armed robbery of automobiles);

(iv) section 2312 (transporting stolen motor vehicles in interstate commerce); or

(v) section 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce).

(2) No property shall be forfeited under this section to the extent of the interest of an owner or lienholder by reason of any act or omission established by that owner or lienholder to have been committed without the knowledge of that owner or lienholder.

(b)(1) Any property—

(A) subject to forfeiture to the United States under subparagraph (A) or (B) of subsection (a)(1) of this section—

(i) may be seized by the Attorney General; or

(ii) in the case of property involved in a violation of section 5313(a) or 5324 of title 31, United States Code, or section 1956 or 1957 of this title investigated by the Secretary of the Treasury or the United States Postal Service, may be seized by the Secretary of the Treasury or the Postal Service; and

(B) subject to forfeiture to the United States under subparagraph (C) of subsection (a)(1) of this section may be seized by the Attorney General, the Secretary of the Treasury, or the Postal Service.

(2) Property shall be seized under paragraph (1) of this subsection upon process issued pursuant to the Supplemental Rules for certain Admiralty and Maritime Claims by any district

court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

(A) the seizure is pursuant to a lawful arrest or search; or

(B) the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, has obtained a warrant for such seizure pursuant to the Federal Rules of Criminal Procedure, in which event proceedings under subsection (d) of this section shall be instituted promptly.

(c) Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under this subsection, the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, may—

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

(d) For purposes of this section, the provisions of the customs laws relating to the seizure,

summary and judicial forfeiture, condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale of this section, the remission or mitigation of such forfeitures, and the compromise of claims (19 U.S.C. 1602 et seq.), insofar as they are applicable and not inconsistent with the provisions of this section, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this section, except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be. The Attorney General shall have sole responsibility for disposing of petitions for remission or mitigation with respect to property involved in a judicial forfeiture proceeding.

(e) Notwithstanding any other provision of the law, except section 3 of the Anti Drug Abuse Act of 1986, the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, is authorized to retain property forfeited pursuant to this section, or to transfer such property on such terms and conditions as he may determine—

(1) to any other Federal agency;

(2) to any State or local law enforcement agency which participated directly in any

of the acts which led to the seizure or forfeiture of the property;

(3) in the case of property referred to in subsection (a)(1)(C), to any Federal financial institution regulatory agency—

(A) to reimburse the agency for payments to claimants or creditors of the institution; and

(B) to reimburse the insurance fund of the agency for losses suffered by the fund as a result of the receivership or liquidation;

(4) in the case of property referred to in subsection (a)(1)(C), upon the order of the appropriate Federal financial institution regulatory agency, to the financial institution as restitution, with the value of the property so transferred to be set off against any amount later recovered by the financial institution as compensatory damages in any State or Federal proceeding;

(5) in the case of property referred to in subsection (a)(1)(C), to any Federal financial institution regulatory agency, to the extent of the agency's contribution of resources to, or expenses involved in, the seizure and forfeiture, and the investigation leading directly to the seizure and forfeiture, of such property;

(6) in the case of property referred to in subsection (a)(1)(C), restore forfeited property to any victim of an offense described in subsection (a)(1)(C); or

(7) In the case of property referred to in subsection (a)(1)(D), to the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, or any other Federal financial institution regulatory agency (as defined in section 8(e)(7)(D) of the Federal Deposit Insurance Act).

The Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, shall ensure the equitable transfer pursuant to paragraph (2) of any forfeited property to the appropriate State or local law enforcement agency so as to reflect generally the contribution of any such agency participating directly in any of the acts which led to the seizure or forfeiture of such property. A decision by the Attorney General, the Secretary of the Treasury, or the Postal Service pursuant to paragraph (2) shall not be subject to review. The United States shall not be liable in any action arising out of the use of any property the custody of which was transferred pursuant to this section to any non-Federal agency. The Attorney General, the Secretary of the Treasury, or the Postal Service may order the discontinuance of any forfeiture proceedings under this section in favor of the institution of forfeiture proceedings by State or local authorities under an appropriate State or local statute. After the filing of a complaint for forfeiture under this section, the Attorney General may seek dismissal of the complaint in favor of forfeiture proceedings under State or local law. Whenever forfeiture proceedings are discontinued by the United States in favor of State

or local proceedings, the United States may transfer custody and possession of the seized property to the appropriate State or local official immediately upon the initiation of the proper actions by such officials. Whenever forfeiture proceedings are discontinued by the United States in favor of State or local proceedings, notice shall be sent to all known interested parties advising them of the discontinuance or dismissal. The United States shall not be liable in any action arising out of the seizure, detention, and transfer of seized property to State or local officials. The United States shall not be liable in any action arising out of a transfer under paragraph (3), (4), or (5) of this subsection.

(f) All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

(g) The filing of an indictment or information alleging a violation of law, Federal, State, or local, which is also related to a forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the forfeiture proceeding.

(h) In addition to the venue provided for in section 1395 of title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

(i)(1) Whenever property is civilly or criminally forfeited under this chapter, the Attorney General or the Secretary of the Treasury, as the case may be, may transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer—

(A) has been agreed to by the Secretary of State;

(B) is authorized in an international agreement between the United States and the foreign country; and

(C) is made to a country which, if applicable, has been certified under section 490(a)(1) of the Foreign Assistance Act of 1961.

A decision by the Attorney General or the Secretary of the Treasury pursuant to this paragraph shall not be subject to review. The foreign country shall, in the event of a transfer of property or proceeds of sale of property under this subsection, bear all expenses incurred by the United States in the seizure, maintenance, inventory, storage, forfeiture, and disposition of the property, and all transfer costs. The payment of all such expenses, and the transfer of assets pursuant to this paragraph, shall be upon such terms and conditions as the Attorney General or the Secretary of the Treasury may, in his discretion, set.

(2) The provisions of this section shall not be construed as limiting or superseding any other

authority of the United States to provide assistance to a foreign country in obtaining property related to a crime committed in the foreign country, including property which is sought as evidence of a crime committed in the foreign country.

(3) A certified order or judgment of forfeiture by a court of competent jurisdiction of a foreign country concerning property which is the subject of forfeiture under this section and was determined by such court to be the type of property described in subsection (a)(1)(B) of this section, and any certified recordings or transcripts of testimony taken in a foreign judicial proceeding concerning such order or judgment of forfeiture, shall be admissible in evidence in a proceeding brought pursuant to this section. Such certified order or judgment of forfeiture, when admitted into evidence, shall constitute probable cause that the property forfeited by such order or judgment of forfeiture is subject to forfeiture under this section and creates a rebuttable presumption of the forfeitability of such property under this section.

(4) A certified order or judgment of conviction by a court of competent jurisdiction of a foreign country concerning an unlawful drug activity which gives rise to forfeiture under this section and any certified recordings or transcripts of testimony taken in a foreign judicial proceeding concerning such order or judgment of conviction shall be admissible in evidence in a proceeding brought pursuant to this section. Such certified order or judgment of conviction, when admitted into evidence, creates a rebuttable

presumption that the unlawful drug activity giving rise to forfeiture under this section has occurred.

(5) The provisions of paragraphs (3) and (4) of this subsection shall not be construed as limiting the admissibility of any evidence otherwise admissible, nor shall they limit the ability of the United States to establish probable cause that property is subject to forfeiture by any evidence otherwise admissible.

(j) For purposes of this section—

(1) the term "Attorney General" means the Attorney General or his delegate; and

(2) the term "Secretary of the Treasury" means the Secretary of the Treasury or his delegate.

Section 1956 of Title 18, United States Code, provides:

Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than not more than [1] $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendants believed such representations to be true.

(3) Whoever, with the intent—

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any

representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3) or (a)(3)[1], or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of—

(1) the value of the property, funds, or monetary instruments involved in the transaction; or

(2) $10,000.

(c) As used in this section—

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between ac-

counts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" has the definition given that term in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder;

(7) the term "specified unlawful activity" means—

(A) any act or activity constituting an offense listed in section 1961(1) of

this title except an act which is indictable under subchapter II of chapter 53 of title 31;

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving—

(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purpose of the Controlled Substances Act);

(ii) kidnapping, robbery, or extortion; or

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978))[1];

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under section 152 (relating to concealment of assets; false oaths and claims; bribery), section 215 (relating to commissions or gifts for procuring loans), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 542 (re-

lating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 875 (relating to interstate communications), section 1005 (relating to fraudulent bank entries), 1006 (relating to fraudulent Federal credit institution entries), 1007 (relating to fraudulent Federal Deposit Insurance transactions), 1014 (relating to fraudulent loan or credit applications), 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1201 (relating to kidnapping), section 1203 (relating to hostage taking), section 1708 (theft from the mail), section 2113 or 2114 (relating to bank and postal robbery and theft), section 2319 (relating to copyright infringement), or section 2320 (relating to trafficking in counterfeit goods and

services) of this title, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled Substances Act (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, section 16 (relating to offenses and punishment) of the Trading with the Enemy Act, any felony violation of section 15 of the Food Stamp Act of 1977 (relating to food stamp fraud) involving a quantity of coupons having a value of not less than $5,000, or any felony violation of the Foreign Corrupt Practices Act; or

(E) a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.).

(8) the term "State" includes a State of the United States, the District of Columbia,

and any commonwealth, territory, or possession of the United States.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental Protection Agency.

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if—

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

(g) Notice of conviction of financial institutions.—If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 or 5324 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

Section 841 of Title 21, United States Code, provides:

Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who

violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of

such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (1) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount

of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 10 grams of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and

shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,00 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a

term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 5 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such a person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a

term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this pargraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised re-

lease of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with Title 18, or imprisoned not more than five years, or both.

(c) Repealed. Pub.L. 98-473, Title II, § 224 (a)(), Oct. 12, 1984, 98 Stat. 2030.

Offenses involving listed chemicals

(d) Any person who knowingly or intentionally—

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe,

that the listed chemical will be used to manufacture a controlled substance except as authorized by this title; or

(3) with the intent of causing the evasion of the record-keeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with Title 18, or imprisoned not more than 10 years, or both.

Boobytraps on Federal property; penalties; definitions

(e)(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than $10,000.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years and shall be fined not more than $20,000.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

Ten-year injunction as additional penalty

(f) In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, or importation of a listed chemical may be enjoined from engaging in any regulated transaction involving a listed chemical for not more than ten years.

Wrongful distribution or possession of listed chemicals

(g)(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall be fined under Title 18, or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under Title 18, or imprisoned not more than one year, or both.

Section 846 of Title 21, United States Code, provides:

Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Section 881 of Title 21, United States Code, provides:

Forfeitures

Subject property

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this subchapter.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, or intended to be distributed, imported, or exported, in violation of a felony provision of this subchapter or subchapter II of this chapter.

(10) Any drug paraphernalia (as defined in section 857 of this title).

(11) Any firearm (as defined in section 921 of Title 18) used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) and any proceeds traceable to such property.

Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims; issuance of warrant authorizing seizure

(b) Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.

Custody of Attorney General

(c) Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under any of the provisions of this subchapter, the Attorney General may—

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

Other laws and proceedings applicable

(d) The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for

that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

Disposition of forfeited property

(e)(1) Whenever property is civilly or criminally forfeited under this subchapter the Attorney General may—

(A) retain the property for official use or, in the manner provided with respect to transfers under section 1616a of Title 19, transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property;

(B) except as provided in paragraph (4), sell, by public sale or any other commercially feasible means, any forfeited property which is not required to be destroyed by law and which is not harmful to the public;

(C) require that the General Services Administration take custody of the property and dispose of it in accordance with law;

(D) forward it to the Drug Enforcement Administration for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General); or

(E) transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer—

(i) has been agreed to by the Secretary of State;

(ii) is authorized in an international agreement between the United States and the foreign country; and

(iii) is made to a country which, if applicable, has been certified under section 2291(j)(b) of Title 22.

(2)(A) The proceeds from any sale under subparagraph (B) of paragraph (1) and any moneys forfeited under this subchapter shall be used to pay—

(i) all property expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs; and

(ii) awards of up to $100,000 to any individual who provides original information which leads to the arrest and conviction of a person who kills or kidnaps a Federal drug law enforcement agent.

Any award paid for information concerning the killing or kidnapping of a Federal drug law enforcement agent, as provided in clause (ii), shall be paid at the discretion of the Attorney General.

(B) The Attorney General shall forward to the Treasurer of the United States for deposit in accordance with section 524(c) of Title 28, any amounts of such moneys and proceeds remaining after payment of the expenses provided in subparagraph (A) except that, with respect to forfeitures conducted by the Postal Service, the Postal Service shall deposit in the Postal Service Fund, under section 2003(b)(7) of Title 39, such moneys and proceeds.

(3) The Attorney General shall assure that any property transferred to a State or local law enforcement agency under paragraph (1)(A)—

(A) has a value that bears a reasonable relationship to the degree of direct participation of the State or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based; and

(B) will serve to encourage further cooperation between the recipient State or local agency and Federal law enforcement agencies.

(4)(A) With respect to real property described in subparagraph (B), if the chief executive officer of the State involved submits to the Attorney General a request for purposes of such subparagraph, the authority established in such subparagraph is in lieu of the authority established in paragraph (1)(B).

(B) In the case of property described in paragraph (1)(B) that is civilly or criminally forfeited under this subchapter, if the property is real property that is appropriate for use as a public area reserved for recreational or historic purposes or for the preservation of natural conditions, the Attorney General, upon the request of the chief executive officer of the State in which the property is located, may transfer title to the property to the State, either without charge or for a nominal charge, through a legal instrument providing that—

(i) such use will be the principal use of the property; and

(ii) title to the property reverts to the United States in the event that the property is used otherwise.

Forfeiture and destruction of schedule I or II substances

(f)(1) All controlled substances in schedule I or II that are possessed, transferred, sold, or offered for sale in violation of the provisions of this subchapter; all dangerous, toxic, or hazardous raw materials or products subject to forfeiture under subsection (a)(2) of this section; and any equipment or container subject to forfeiture under subsection (a)(2) or (3) of this section which cannot be separated safely from such raw materials or products shall be deemed contraband and seized and summarily forfeited to the United States. Similarly, all substances in schedule I or II, which are seized or come into the possession of the United States, the owners of which are unknown, shall be deemed contraband and summarily forfeitable to the United States.

(2) The Attorney General may direct the destruction of all controlled substances in schedule I or II seized for violation of this subchapter; all dangerous toxic, or hazardous raw materials or products subject to forfeiture under subsection (a)(2) of this section; and any equipment or container subject to forfeiture under subsection (a)(2) or (3) of this section which cannot be separated safely from such raw materials or products under such circumstances as the Attorney General may deem necessary.

Plants

(g)(1) All species of plants from which controlled substances in schedules I and II may be derived which have been planted or cultivated in violation of this subchapter, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the United States.

(2) The failure, upon demand by the Attorney General or his duly authorized agent, of the person in occupancy or in control of land or premises upon which such species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, shall constitute authority for the seizure and forfeiture.

(3) The Attorney General, or his duly authorized agent, shall have authority to enter upon any lands, or into any dwelling pursuant to a search warrant, to cut, harvest, carry off, or destroy such plants.

Vesting of title in United States

(h) All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

Stay of civil forfeiture proceedings

(i) The filing of an indictment or information alleging a violation of this subchapter or subchapter II of this chapter, or a violation of State or local law that could have been charged under this subchapter or subchapter II of this chapter, which is also related to a civil forfeiture proceeding under this section shall,

upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

Venue

(j) In addition to the venue provided for in section 1395 of Title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

Agreement between Attorney General and Postal Service for performance of functions

(*l*) The functions of the Attorney General under this section shall be carried out by the Postal Service pursuant to such agreement as may be entered into between the Attorney General and the Postal Service.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1995 387147 20111

No. 95-346

(14)

Supreme Court, U.S.
FILED
NOV 22 1995
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT CHARLES W. ARLT, SR.

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231

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EDITOR'S NOTE

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WILL BE ISSUED.

Question Presented

Whether a statutory in rem civil forfeiture of assets pursuant to 21 U.S.C § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) constitutes punishment to implicate the multiple punishment prong of the Double Jeopardy Clause when it is conducted in a separately docketed proceedings and the probable cause for the forfeiture is precisely the same conduct and violations as charged in the criminal indictment and prosecution.

Parties to the Proceedings

The petitioner is the United States of America. The respondents are Charles Wesley Arlt, Sr., James Wren, Payback Mines, and the defendants are properties listed in the caption of the governments's notice of motion and motion for summary judgement, Respondents' Appendix, infra, 1a-2a.

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Other Authorities:

Black's Law Dictionary, Sixth Edition 29

Prosecution and Defense of Forfeiture Cases by David Smith . . 39

Prosser & Keeton on the Law of Torts, (5th Edition 1984) . . . 33

No. 95-346

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET. AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT CHARLES W. ARLT, SR.

The respondent, Charles W. Arlt, Sr., claimant-appellant in the case below, opposes the grounds of the petition for writ of certiorari, and instead suggest that certiorari be granted to review and affirm the judgement of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (Pet.App. 1a-23a)[1] is reported at 33 F.3d 1210 (9th Circ. 1994). An order amending the opinion of the court of appeals (Pet.App. 24a-29a) is reported at 56 F.3d 41, together with a dissent from the denial of rehearing en banc.

JURISDICTION

The judgement of the court of appeals was entered on September 6, 1994. (Pet.App. 1a-23a). A petition for rehearing was denied, and the opinion amended, on May 30, 1995, (Pet.App. 24a-29a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent Arlt adopts the petitioner's "Constitutional and Statutory Provisions Involved." Pet. 2. The provisions of 18 U.S.C. §§ 982 and 3554, and 21 U.S.C. § 853, for criminal forfeiture as set forth in the appendix. Resp. App. 142a-148a.

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[1]"Pet.App." & "Resp.App.", refer to the Petitioner's and Respondent's Appendixes respectively. "Pet.", refers to a Petition page indicated.

STATEMENT OF THE CASE

1. On March 29, 1991, claimants-respondents James Eli Wren ("Wren") and Charles Wesley Arlt ("Arlt") were arrested and have remained incarcerated. On June 12, 1991, respondents were indicted by the government and charged in count one of conspiracy to manufacture methamphetamine [21 U.S.C. § 846], in count two of conspiracy to launder money [18 U.S.C. § 371], and counts three to twenty-two of money laundering [18 U.S.C. § 1956(a)(1)]. Pet.App. 79a-105a.

2. On June 17, 1991, the same plaintiff filed a civil forfeiture complaint against the defendant properties listed in the caption (hereinafter the "properties"). The civil complaint alleged the same conduct and criminal violations set forth in the criminal indictment against Wren, Arlt and others. The government invoked in rem forfeiture statutes § 881(a)(6) and 18 U.S.C. §981(a)(1)(A) in the civil complaint. Petitioner has had possession of the properties since they were sized between July 3 and July 25, 1991.

On March 27, 1992, respondents Arlt, Wren, and others were found guilty of the indictment charges. Pet.App. 106a-108a. On December 4, 1992, while Arlt and Wren were serving their sentences in prison, the government filed its motion for summary judgement in the forfeiture action. Resp.App. 1a-29a. Pet.App. 55a-75a. The government's "uncontroverted facts and conclusion of law" established its probable cause burden by using the criminal indictment, prosecution, judgement, commitment, and convictions of Arlt and Wren as the grounds for summary judgement in the civil proceedings. Pet.App. 55a-75a.

On January 26, 1993, respondents Arlt and Wren, in pro se, opposed the government's motion for summary judgement by vigorously disputing the government's alleged "uncontroverted facts" (Resp.App. 48a-54a. Arlt and Wren showed that none of the properties were connected to an actual illegal act and they were not the proceeds of drugs, nor used to or intended to facilitate a drug activity. Respondents showed that they had permission from the Drug Enforcement Administration to purchase hydriodic acid from a factory for use in Respondents' gold-leaching solution for mining. Respondents showed that they had filed or caused to be filed a proper Currency Transactions Report and IRS 1099 form for every cash transaction in the complaint requiring form. Resp.App. 43a. Respondents showed that all of the cash transactions were legal in themselves, and that it was the government which was imputing illegalities to respondents' normal business transactions of buying and reselling mining

chemical. Resp.App. 31a-52. Respondents pointed out to the court that no drugs were ever found with them, no customers or suppliers testified against them, and no alleged "meth lab" was ever located at the Respondents' mining location in Daggett, California, or Osceola, Nevada or elsewhere. Resp. App. 31a-34a, 36a-47a, 48a-56a.

On March 23, 1993, respondents Arlt and Wren moved to strike the erroneous portions of the government's reply to claimants' opposition to motion for summary judgement. Resp.App. 58a-70a. Claimant's declaration and exhibits demonstrated a legal source of the vehicles, boat, airplane, personal property, silver bars, and money in several accounts. Respondents demonstrated the legal procedures they used when making chemical orders or cash purchases, and contended that use of cash is normal and not per se proof of mysterious drug activity. Resp.App. 49a-50a. Respondents demonstrated that there were no reliable witness to any illegal activity by claimants Arlt and Wren. Resp.App. 50a, 58a-70a.

The only fact not in dispute was that the government met its burden of proof of the probable cause for forfeiture based on the criminal indictment, prosecution, and convictions of respondents Arlt and Wren. Pet.App. 63a, 64a-69a; Resp.App. 58a-69a.

On April 1, 1993, the district court granted the government's motion for summary judgement and adopted in full the government's allegations in its "uncontroverted facts and conclusions of law," which incorporated the indictment and criminal prosecution for probable cause. Pet.App. 75a-78a.

On April 9, 1993, respondents Arlt and Wren filed a motion for reconsideration of the judgement of forfeiture, it was file-stamped on April 16, 1993. Resp.App. 71a. Respondents vigorously disputed the government's "uncontroverted" facts that any illegal acts were involved or connected to the properties or that "proceeds" were involved. Resp.App. 71a-80a.

The district court denied the respondent's motion for reconsideration on May 11, 1993, (Resp.App. 90a), and then respondents filed a timely notice of appeal on June 15, 1993.

On October 1, 1993, on direct appeal, Arlt and Wren requested that (1) the judgment of forfeiture be reversed in light of the rulings of the United States Supreme Court that forfeiture of properties alleged as instrumentalities of drug law violations is a monetary punishment, and as such, it was subjected to the limitations of the excessive fines and proportionality principles of the

Eighth Amendment of the United States Constitution (Resp.App. 94-99a); (2) the forfeiture judgement be reversed because, in the context of multiple punishments and successive prosecutions, the Double Jeopardy Clause applies to a monetary punishment in civil drug forfeitures of alleged conveyances and instrumentalities whenever the forfeiture is used in any way to punish the owner of the property (Resp.App. 99a-101a); and (3) that the district court in California had not acquired jurisdiction of the res to seize and forfeit defendant property (a shrimp boat) not in the district (being in Mississippi). Resp.App. 101a-102a.

The government had full opportunity to argue against each of the respondents' issues in its appellee answer brief, and it did so. Resp.App. 107a-114a.

The government's appellee brief from page 2 to 21 (Resp.App. 112a-130a) reargued its contention in the forfeiture motion for summary judgement, uncontested facts and conclusion of law, and indictment. The government candidly and frequently admitted that the probable cause burden for forfeiture was met by Arlt's and Wren's criminal indictment, prosecution and convictions for the violations and conduct underlying this forfeiture complaint. Resp.App. 112a-137a. However, the government argued that Arlt and Wren were collaterally estopped from denying that they laundered narcotics proceeds; that forfeiture does not violate the Double Jeopardy Clause of the Fifth Amendment,[2] and that claimants' waived any jurisdiction defense because the seizures and forfeitures were within the court's jurisdiction. Resp.App. 137a-139a.

On September 6, 1994, the Ninth Circuit panel ruled that the claimants' multiple punishment argument was correct; that multiple punishment occurred when a civil forfeiture of property under 21 U.S.C. § 881(a)(6) and 18 U.S.C. §

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[2] Citing United States v. Halper, 490 U.S. 435 (1989), Respondents' double punishment issue was presented concisely in about two pages since the facts of this case were undisputed that the government conducted a criminal prosecution and then based the separate civil forfeiture probable cause precisely upon the same criminal conviction. The only issue remaining was whether the relevant in rem statutes elected by the government were mean as "punishment." Austin v. United States, 113 S.Ct. 2801 (1933) appeared controlling for 21 U.S.C. §881(a)(4)(7) and (6) in determining that the statutes involved were intended by Congress to deter and punish. The government's brief answered the claim in about two pages of its 29 page brief. It could have expounded much more on the issue, but waived the opportunity. Resp. App. 135a-137a.

981(a)(1) is based on the same conduct as the claimants' criminal indictment and prosecution. Thus, the multiple punishment prong of the Double Jeopardy Clause has been violated. Pet.App. 1a-23a. The panel did not reach the merits of the respondents; other claims, but stated in 33 f.3d at 1215, n.3. Pet. App.5

> "Although the claimants relief would be incomplete if we were to rest our decision on probable cause, and thus we do not reach that ground, it seems clear that the government lacked such cause for the institution of these proceedings. In seeking to satisfy its probable cause burden the government relies almost exclusively on Arlt's and Wren criminal conviction. Because these convictions were not obtained until <u>after</u> the institution of the forfeiture action, it may not do so." (Emphasis in the original.)

See also 33F.3d. at 1220, n.11. Pet.App. 18a.

The decision showed that the government invited this problem for itself in order to "obtain a significant advantage:"

> "[I]f it succeeded in the criminal case it could obtain summary judgement based on the conviction (assuming that it had probable cause at the time it instituted the forfeiture action), while if it lost it could still seek forfeiture and urge that the more lenient standard applicable in civil proceeds applied. See 1 David B. <u>Smith, Prosecution and Defense of Forfeiture Case</u>, ¶ 10.01, at 10-4 to 10-5 (1993) (noting that it is to the government;s advantage to have the civil forfeiture action heard after the criminal case). We believe that such a coordinated, manipulated strategy heightens, rather than diminishes, the concern that the government is forcing an individual to "run the gantlet" more than once. <u>Green</u>, 355 U.S. at 190. We are not willing to whitewash the double jeopardy violation in this case by affording constitutional significance to the label of 'single coordinated, prosecution.'"

33 F.3d at 1216-17; Pet.App. 9a-10a.

In a footnote, the panel noted that to condone such prosecutorial manipulation, when the government has the option of criminal forfeiture, "would be encouraging one of the worst abuses of prosecutorial power--the government's coordinated use of multiple proceedings to harass or exhaust particular defendants."[3] 33 f.3d at 1217, n.6; Pet.App. 10a, n.6.

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[3] On December 1, 1994, the same panel reversed Arlt's convictions and remanded the case for a new trial when it found Arlt's Sixth Amendment right to self representation was violated. Recently, before Arlt's new trial, the government superseded its indictment against Arlt with a new criminal forfeiture count, 21 U.S.C. § 853, for the exact same properties involved in the instant civil forfeiture judgement which was ordered to be dismissed. Resp.App. 149a-183a. All other charges on Arlt's new indictment are the same, but the new criminal forfeiture count indicts that the government could have brought the forfeiture by indictment the first time. The defendant properties in this case were seized by warrant upon an affidavit by IRS agent Mullen who suspected the properties were obtained in violation of drug laws. Although the

The Ninth Circuit panel expressly disagreed with the Second and Eleventh Circuit cases which were decided prior to Department of Revenue of Montana v. Kurth Ranch, 114 S.Ct. 1937 (1994). These two circuits held that cases like the instant one did not constitute separate proceedings for double jeopardy purposes when there was criminal prosecution and a "parallel" civil forfeiture proceeding on the same violations. The Ninth Circuit stated "we believed that the position adopted by the Second and Eleventh Circuits contradicts controlling Supreme Court precedent and common sense." 33F.3d at 1216. Pet.App. 7a-8a.

It should be noted that the Ninth Circuit stated that the government's own pleading admitted that this forfeiture was based on the prior criminal indictment and conviction. "We have little difficulty in determining that this civil forfeiture proceeding constitutes a separate 'proceeding' from the prosecution, which resulted in a claimants' conviction." Id. The panel noted that the government could use criminal forfeiture statutes in this case pursuant to 18 U.S.C. §§ 982 and 3554, and 21 U.S.C. § 853. Id. See Resp.App. 142a-149a.

The panel noted that the government had argued vigorously in the district court that Title 18 U.S.C. § 981(a)(1)(A) is not limited to the same proceeds of illegal activity and that it continued to rely on that statute in defending the district court's order of forfeiture. Therefore, the panel would not permit the government to suddenly now claim that the case involves only the forfeiture of illegal proceeds. 33 F.3d 1222, n.12. Pet.App. 21a, n.12.

The panel concluded that the decision in Austin will have a significant

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IRS seized the properties, U.S. Attorney sought the forfeiture. Having lost the civil properties in this case, the IRS then imposed notices of deficiencies based on the criminal indictment and prosecution. If Arlt prevails at the forthcoming new trial and criminal forfeiture, the IRS could claim the property for taxes since they have disagreed with Arlt's tax returns. It would appear that the criminal forfeiture count in the 1995 superseding indictment of Arlt is a dual proceeding upon the same cause of action as this decision on petition for writ of certiorari. The criminal forfeiture and ITS new tax claim on the property, based on the same conduct, were brought in 1995 after the government lost this civil forfeiture decision in 1994. They could be a paradigm of the "worst abuses of prosecutorial power" identified by the panel. 33 f.3d at 1217. n.6. Pet. App. 10a. Arlt must continue to "run the gantlet" again after obtaining a favorable judgement. Id. Arlt had timely complied with the IRS and had submitted appropriate tax returns upon notice of deficiency. The IRS and Arlt are attempting to settlement he amount due.

effect on cases like this one which involve a statutory in rem forfeiture action based on the same offense as the criminal prosecution. Moreover, the panel stated that the government will have to rely on criminal forfeiture to impose forfeiture and criminal punishment in one prosecution and "forego the favorable burden it would face in a civil forfeiture proceeding. Id.

3. The government sought rehearing, as stated in the petition, on October 14, 1994. The panel ordered responses from claimants which were filed February 22, 1995, and an Amicus Curiae brief in support of the decision was accepted from the National Association of Criminal Defense Lawyers. After review, the panel affirmed its opinion and amended it by holding that its categorical approach, determining that § 881(a)(6) was punishment, was compelled by decision in Kurth Ranch, supra. Pet.App. 25a.

A dissent was filed by seven judges who based their legal conclusion on a tabloid article in a local San Francisco newspaper which rumored that the Ninth Circuit's decision could free hundreds of drug dealers.[4] The dissenting judges' concern was that the decision was wrong because the Double Jeopardy Clause would protect a defendant from criminal prosecution after a "mere" seizure of illicit proceeds.

REASONS WHY THE PETITION SHOULD BE GRANTED, AND THE DECISION AFFIRMED

Respondent submits that petition should be granted and the decision below

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[4] The unresearched tabloid article printed on May 9, 1995, focused on two local drug dealers who received favorable rulings by the district court upon the decision, and some claims by prosecutors of alleged injustices to come. The article failed to reveals that prosecutors were aware of the Double Jeopardy implications since this Court's decision in United States v. Halper, 435 U.S. 490 (1989), and that any Double Jeopardy violations is the direct result of the prosecutors' strategic planning of civil and criminal punishments upon the defendants. As for the two local drug cases that received the favorable rulings, both were appealed by the government and are listed in footnote 6 in the petition at page 22. See United States v. Ailemen, No. 95-10233 & 95-10244; and United States v. Wilson, 95-10083. However, the government won the Ailemen case based on United States v. Cretacci, 62 F.3d 307 (9th Circ. 1995) where the judge who authored the instant decision held that uncontested forfeitures do not implicate the multiple punishment prong of the Double Jeopardy Clause. The Wilson case is still pending concerning the civil forfeiture of Mr. Wilson's expensive home prior to a criminal indictment for the same underlying offense. Thus, the government only has one loss in over a year since this decision, and they have appealed that case. There are not other known government losses to support the dissent's claim at this time.

affirmed for the following reasons: (1) Because the petitioner's Question Presented is missing the essential statutory predicates, review should be made on respondents' complete and accurate Question Presented which reflects the narrow statutory basis of the decision below; (2) Misstatements of fact and law in the petition have a bearing on what issues would properly be before the Court; (3) There is an appearance of conflict in a minority of the circuits on the Question Presented herein, but there is no conflict with this Court; (4) The Ninth Circuit fully considered and correctly decided the issues raised by the government below, based on the facts of this case and the precedents of this Court; and (5) It is important that the petition be granted and the decision below be affirmed because of the salutary effects and economic benefits to the administration of justice resulting from the decision.

1. Because the Petitioner's Question Presented is missing the essential statutory predicates, review should be made upon Respondents' complete and accurate Question Presented which reflects the narrow statutory basis of the decision below.

(a) The question actually presented at the Ninth Circuit was whether forfeiture pursuant to 18 U.S.C. §981(a)(1)(A) and 21 U.S.C. § 881(a)(6) constitutes "punishment" for purposes of the Double Jeopardy Clause. As noted herein, the government did not limit their claim to just "proceeds" as they now represent. The Ninth Circuit decision was governed by three decisions of this Court. United States v. Halper, 490 U.S. 435, 104 L.Ed.2d 487, 109 S.Ct. 1892 (1989); Austin v. United States, 509 U.S.___, 125 L.Ed.2d 448, 113 S.Ct. 2801 (1993); Department of Revenue of Montana v. Kurth Ranch, 511 U.S. ___. 128 L.Ed.2d 767, 114 S.Ct. 1937 (1994).

The issue decided was that the civil statutory in rem forfeiture of property under 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) is categorically "punishment" based on the three part test in Austin v. United States, 113 S.Ct. 2801 (1993); and, that when the government based the civil in rem forfeiture of property on the probable cause of the owner's criminal indictment, prosecution and criminal conviction, the multiple punishment prong of the Double Jeopardy Clause prohibited a second civil punishment for the same conduct and criminal offense on the test in United States v., Halper, 490 U.S. 435 (1993).

(b) The facts in the records do not show that the res, which consisted of various assets, vehicles, silver bars, an airplane, a boat, and money in

bankers were "proceeds" of drug transactions as the government now claims. The Ninth Circuit stated:

> "If we were to look at the particular facts of this case, it is far from clear that we would accept the government's argument that the entire res consists of narcotics proceeds...[I]t would be most difficult, on the records before us, to conclude that the property consisted entirely of illegal proceeds."

33 F.3d at 1220, n.11; Pet.App. 18a; 33 F.3d at 1222, n.12; Pet.App. 21a.

The Ninth Circuit also noted that even if there various assets were "illegal proceeds," the government had made the choice to use certain civil in rem forfeiture statutes that impose punishment based on the Supreme Court's analysis and tests in Austin and Halper. The decision noted that the petitioner's argument "not only misconceives the legal standard established in Austin, but also misstates the scope of the statute involved." Pet.App. 18a.

The Ninth Circuit further noted that the government also sought forfeiture under the money laundering statute, 18 U.S.C. § 981(a)(1)(A), which applies to any property which is "involved in" an illegal money laundering transaction.

> "The government took pains to argue before the district court that property "involved in" a money laundering offense included more than the actual money that is laundered. See government's Memorandum of Contention of Fact and Law (CR46), at 17-20. Indeed, the government relied on a case which specifically **rejected** any limitations of § 981(a)(1)(A) to criminal proceeds."

United States v. $405,089.23, 33 F.3d at 12221-22. (Emphasis in the original, Pet.App. 21a.)

(c) The facts of the record below do not permit the formulation of the petitioner's partial Question Presented since the issue of "punishment" was not decided solely on the notice of "illegal proceeds" as now presented by petitioner. What is missing from the petitioner's Question Presented is the statutory basis for the forfeiture, i.e., the particular civil in rem forfeiture statute which would determine whether the scope of the particular statute is solely remedial in its purpose or it serves to punish and deter conduct, and whether Congress tied forfeiture to the commission of specific offenses. See Austin, supra. Without stating the particular civil in rem statute for the forfeiture judgement, the Question Presented in the petition is not reflective of the entire issue below or the facts of the record. Thus, review is necessary to clarify whether the use of the statutes involved constituted "punishment."

2. Misstatements of facts and law in the petition have a bearing on what issues would properly be before the Court.

(a) At Pet. 2, the petition has misstated the criminal charges in the

indictment upon which the subsequent instant forfeiture judgement was based. Respondents Arlt and Wren were not convicted of any substantive charges relating to methamphetamine, rather they were convicted of one general drug conspiracy count, 21 U.S.C. § 846, one conspiracy count to commit offenses against the United States, money laundering, 18 U.S.C. § 371, and eighteen (18) counts of money laundering instrument, 18 U.S.C. § 1956.

(b) At Pet. 4-5, contrary to petitioner's claim, the Ninth Circuit panel did not conclude that "all actions brought under the federal civil forfeiture statutes impose 'punishment' for double jeopardy purposes."[5] The panel only concluded that 21 U.S.C. § 881(a)(6) [and 18 U.S.C. § 981(a)(1)(A)] was categorically a punishment statute based on the decision in Austin v. United States, supra, concerning § 881(a)(4) and (7) which have nearly identical "innocent owner" language. Also, the panel looked at the requirements of the forfeiture statute as a whole, the history of forfeiture, and the legislative intent of § 881(a)(6) "to deter and punish." Thus, not "all actions" were covered by the decision as stated in the petition, rather only those in rem civil forfeiture actions under 18 U.S.C. § 981(a)(1)(A) and 21 U.S.C. § 881(a)(6) which the government has elected to specifically base this forfeiture.

Furthermore, the decision clearly stated that it was only dealing with the statutes as issue in this case, not all actions. "These [Austin] principles dictated that forfeiture under the statutes at issue in this case constitute 'punishment'." (Emphasis added.) Pet.App. 19a. "Thus, applying the principles set forth in Austin, we must conclude that the statutes relied upon by the government in this case operated at least in part to punish and deter." Pet.App. 20a. (Emphasis added.)

Likewise, the decision does not affect remedial forfeitures or other punitive forfeiture actions if the defendant consents. "Nor do we express any

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[5] There is no place in the decision identified by the petitioner to support the claim that the decision went to "all" civil forfeiture actions. Indeed, the author of the decision in the case, Judge Stephen Reinhardt, stated in the first sentence of his opinion in United States v. Cretacci, 62 F.3d 307, 308 (9th Cir. 1995) that "[w]e have recently held some civil forfeitures constitute 'punishment' for the purpose of the Double Jeopardy Clause. See United States v. $405,089.23, 33 F.3d 1210 (9th Circ.) amended on dial of reh'd 1995 W1 32186 (1995)." (Emphasis added). Thus, if the author of this case states that this decision only applies to some civil forfeitures, the petition's ground is unfounded.

view as to bifurcated proceedings before the same fact finder and presiding judicial officer." Pet.App. 8a-9a, n.4. The decision was a narrow ruling.

(c) At Pet. 8 and 10, the petition incorrectly states that the panel had "effectively overturned" United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984). The panel did not overturn 89 Firearms, rather it observed that this Court abandoned the Kennedy-Ward[6] test, on which the Supreme Court rested its double jeopardy holding in 89 Firearms, a test which focused heavily on the label Congress has attached to the particular section. Pet.App. 13a-14a. "If Congress indicated a preference that the proceeding be dominated 'civil' rather than 'criminal,' the Court would defer to the preference except in extraordinary circumstances." Pet.App. 13a. Consequently 89 Firearms was a "remedial" forfeiture to remove dangerous firearms from society's harm under 18 U.S.C. § 924(d).[7] The panel merely followed Halper's instructions that a sanction's civil or criminal label is not determinative of whether a sanction is punishment or not.

The Ninth Circuit decision actually states that "[i]n light of the decision in Austin, and applying the Halper test here, we find the conclusions inescapable that civil forfeitures under 21 U.S.C. § 881(a)(6) constitutes "punishment" which triggers the protection of the Double Jeopardy Clause." Pet.App. 16a. The court simply held that some civil forfeiture statutes are punitive (the Austin test) and that if those statutory in rem actions are based on precisely the same conduct as addressed in the claimants' criminal indictment and prosecution, the multiple punishment prong of the Double Jeopardy Clause will be implicated (the Halper test). The court expressly limited this decision to civil in rem forfeiture statutes 18 U.S.C. § 981(a)(1)(A) and 21 U.S.C. § 881(a)(6) and found that based on the Austin test, those statutes do not serve solely remedial purposes, but were also intended to

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[6] Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) and United States v. Ward, 488 U.S. 242 (1989).

[7] The decision i 89 Firearms is distinguishable from Halper on the ground that the Supreme Court found 18 U.S.C. § 924(d) to be remedial rather than punitive. Halper was found to apply to in rem forfeiture, such as 21 U.S.C. § 981(a)(4) and (a)(7) in Austin, where the statute is clearly punitive in purpose. Subsequent to the Supreme Court decision in 89 Firearms, Congress amended § 924(d) to provide that the firearms be returned to the possessor..."unless possessor is in violation of the law." Thus, there is now congressionally intended special protection for fun owners beyond the Double Jeopardy Clause.

deter and punish.

(d) At Pet. 8 and 19 to 25, the petition misstates the facts and law that the ruling "seriously threatens the ability of federal and state authorities to prosecute crimes and administer important civil forfeiture programs within their respective jurisdiction." This is utterly false.[8] The petitioner's and state amici's ability to seek in rem forfeitures or criminal forfeitures has not been effected, but their tactics that implicate constitutional concerns are corrected. The decision in essence requires the government to efficiently utilize civil in rem and criminal forfeiture statutes. The anarchy suggested by the petitioner is puffery. Petitioner and amici both still enjoy the full use of civil in rem forfeitures. The government's only task is that they will have to decide whether to include a criminal forfeiture count in the indictment or to pursue only a civil forfeiture along with criminal convictions in the criminal prosecution by including criminal forfeiture statutes in the indictment. See 18 U.S.C. § 982 and § 35554, and 21 U.S.C. § 853. Resp.App. 142a-148a. Similarly, tactical "dual sovereignty" proceedings have been utilized by the state and federal law enforcement to avoid double jeopardy rights.[9]

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[8] The government;s 1995 superseding indictment of Respondent Arlt, on remand, with the inclusion of a new criminal forfeiture count under 21 U.S.C. § 853 (Resp.App. 149a-183a) is identical to the civil forfeiture allegations in the complaint in this case. Compare the 1991 indictment (Pet.App. 79a) and the 1991 civil forfeiture complaint, (Pet.App. 30a) with the 1995 superseding indictment for criminal forfeiture and the criminal offenses. Resp.App. 149a. The government elected dual proceedings for the same offense in 1991. It is unclear why the government would argue that they could be hampered in any way with criminal prosecutions in asset forfeiture programs.

[9] The state and local law enforcement agencies typically share handsome rewards from referring state cases to the U.S. Attorneys or in which the state participated in. 21 U.S.C. § 881(e)(3)(4). See footnote 27 infra. Also, federal and state authorities frequently join together in the arrest of defendants and the seizure of property. The state and federal authorities often elect to separately prosecute the crime and pursue the forfeiture of the defendant's property in different forums under the fiction of "dual sovereignty" to avoid the personal protections of the Double Jeopardy Clause even though there is but one drug offense. Respondent Arlt and Wren were also subjected to Nevada and California state forfeitures of their vehicles, heavy mining equipment, and personal property based on the same underlying conviction for the drug conspiracy and money laundering charges. Both Nevada and California, like the petitioner, waited until Arlt's and Wren's convictions to move for summary judgement.

There is no evidence to support the "chill" claims, and the petitioner has always been aware of the use of criminal forfeiture statutes to obtain the exact same properties from the defendants by including the property in the indictment. For example, the petitioner's footnote one(1) and two (2) indicate that the government has now taken the same defendant properties in this 1991 case and included it in a new criminal forfeiture count in the 1995 superseding indictment against respondent Arlt on his remand for a new trial. Pet.App. 3, 5; Resp.App. 149a-183a. Likewise, when an indictment is not returned or the defendant is acquitted of criminal charges, the petitioner may still seek forfeiture of assets through civil in rem forfeiture by invoking statute 21 U.S.C. § 881(a) or 18 U.S.C. § 981(a)(1)(A) without violating the Double Jeopardy Clause. With this in mind, the petitioner's and amici's claim that effective law enforcement and asset forfeiture would be "chilled" has no basis in the fact or law.

This Court has previously noted the petitioner's direct pecuniary interest in the forfeiture business in U.S. v. James Daniel Good Real Property, 510 U.S. ___ 126 L.Ed. 2d 490, 540, n.2, 114 S.Ct. ___(1993):

> The extent of the Government's financial stake in drug forfeiture is apparent from a 1990 memo, which the Attorney General urged United States Attorneys to increase the volume of forfeitures in order to meet the Department of Justice's annual budget target:
>
> 'We must significantly increase production to reach our budge target. '...Failure to achieve the $470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990.' Executive Office for United States Attorneys, U.S. Dept. of Justice, 38 United States Attorney's Bulletin 180 (1990).

It is particularly important in the instant case to see whether the petitioner's claim is accurate when it insists that the government's efforts to enforce criminal laws and administer asset forfeiture programs will be chilled if they cannot criminally and civilly punish defendants in separate proceedings for precisely the same conduct and violations. See Harmelin v. Michigan, 111 S.Ct. 2680 (1991) (opinion of Scalia, J.) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit.")[10]

Interestingly, Nevada and California are members on the Amicus Curiae Brief.

[10] The Ninth Circuit has observed that the "war on drugs has resulted in an enormous increase in federal asset forfeitures in the last decade." United States v. $191,910.00, 16 F.3d. 1051, 1069 (9th Circ. 1994). The petitioner's annual net gain from all types

Understandably, neither the petitioner nor the amici mention their substantial profit motives in their asset-forfeiture income programs.

In United States v. Littlefield, 821 F.2d 1365, 1367-68 (9th Circ. 1987), the government appealed and won a case concerning the use of criminal forfeiture under 21 U.S.C. § 853 to do the job of civil forfeiture under § 881.

> Our conclusion is consistent with the legislature's stated understanding that the government would be able to accomplish in a criminal forfeiture proceeding under Section 853 precisely what it could do through a separate civil forfeiture proceeding under Section 881.
>
> > Where the issue relating to the civil forfeiture are the same as or closely related to those that will arise in the prosecution of a drug offense, related to those that will arise in the prosecution of a drug offense, **it is a waste of valuable judicial and prosecutive resources to require separate civil forfeiture proceedings...**
> >
> > Thus, a more efficient mechanism for achieving the forfeiture of a defendant's proceeds from his drug trafficking or of other property he has used int he offense is to permit the criminal forfeiture of such property and thereby consolidate the forfeiture action with the criminal prosecution. [21 U.S.C. § 853] creates such a mechanism.
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> S.Rep. No. 225, 98th Cong., 2d Sess. 210, reprinted in 1984 U.S. Code Cong. & Admin.News 3182, 3393. It would frustrate the goals of judicial and prosecutorial efficiency to construe Section 853 as covering only a portion of property that Section 881 reaches in its entirety. (Emphasis added).

Criminal forfeiture under 21 U.S.C. § 853 is punishment and reaches the same properties and proceeds for the same underlying criminal conduct that civil forfeiture pursuant to 21 U.S.C. § 881(a)(6) reaches. In Littlefield,

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of forfeiture few from $27 million in 1985 to $531 million in 1992. Jeff A. Schnepper, Mandated Morality Lead to Leagalize Theft, USA Today Mag, March 1994 at 35. Between 1985 and 1993, the Department of Justice $3.2 billion worth of assets. Charles Oliver, a Forfeiture of Civil Liberties? Investors Daily, March 7, 1995, at A1. These assets include "home, land, busineses, currency, cars, planes, yachts and live-stock." Stacy J. Pollack, Note, Proportionality in Civil Forfeiture; Toward a Remedial Solution, 63 Geo. Wash. L. Review, 456, 457 (1994). State and local governments also benefit from federal forfeitures. In recent years, the Department of Justice has transferred $1.2 billion in cash and property over to 3,000 state and local agencies. Review of Federal Asset Forfeiture Program: Hearing before the Legislation & National Security Subcomm. of the House Comm. on Government Operations, 103d Cong., 1st Sess. 69 (1993)(statement of Cary H. Copeland, Director and Chief Counsel, Executive Office for Asset Forfeiture, Department of Justice). The most recent GAO estimate (in 1992) puts the federal government's total forfeiture inventory at $1.9 billion. Carl Horowitz, What Can Government Take From You? Even Innocent People Can Have Property Seized, Investor's Daily, Dec. 9, 1993 at 1. Civil Forfeitures are thus a substantial source of revenue for both federal and local governments. See Schnepper, supra at 35.

the government urged that it was more efficient to include the forfeiture of assets related to the offense int he criminal prosecution by using criminal forfeiture § 853 in the indictment as opposed to holding a separate civil forfeiture proceeding under § 881 after the criminal prosecution.

Now the petitioner switches its position and claims that requiring it to conduct one proceeding for both forfeiture and criminal prosecution will chill or hamper its abilities to seek forfeiture and criminal prosecution. The only thing chilled or hampered will be the tremendous advantage it has in requiring a defendant to defend himself in a criminal proceeding and then using the conviction against him in the separate civil forfeiture proceeding.

The decision noted this significant advantage and pointed out that the government could have sought criminal forfeiture in this case. Pet.App. 9a, 22a. In this case, the government elected not to use criminal forfeiture § 853 in the indictment but rather pursued a separate civil forfeiture for precisely the same conduct and violations. The petitioner claims that the decision has caused a glut of interlocutory appeals. Pet. 20, n.6. There is bound to be hundreds of appeals in the normal course anyway and the double jeopardy issue may be one of several issues. Any congestion being caused below is a result of the petitioner's blanket requests to stay all proceedings with this issue in the district and appellate courts pending this petition.

Many of the cases listed in the petition had already been decided in the petitioner's favor. The list is the equivalent of "puffing" to create a misleading impression of "grave uncertainty" in the status of the cases. A check of the listed cases reveals only a couple interlocutory appeals by the government for dismissed indictments. The extent of the petitioner's listed cases is a result of the government's strategy of dual proceedings to criminally indict a defendant and forfeit the assets related to the conduct and violations of the charged indictment in a separate civil forfeiture. Thus, the "problem" was invited by the government's strategy and would resolve itself if assets are either forfeiture in the criminal prosecution pursuant to § 853 or in a civil in rem forfeiture when an indictment is not returned.

The petitioner fails to mention that dozens of cases were resolved in its favor because the defendants did not contest or file a claim in the forfeiture proceeding or the in rem civil forfeiture was based on a different violation than the criminal indictment and prosecution. Accordingly, any problem will

pass in a short time after these appeals since the petitioner and amici are now effectively and properly using criminal forfeiture with the indictment offenses to accomplish the same job more economically.

The petitioner's footnote 7 is a list that is also created exclusively as a result of the petitioner's pressure upon the Central District court to not grant relief to any double jeopardy claims while petition is pending. The petitioner also did this while it petitioned the Ninth Circuit for rehearing, thus causing a huge backlog. Such a delay tactic itself raises significant Due Process concerns about the manipulative strategy of the petitioner to prevent the normal flow of cases throughout he courts to the detriment of defendants' liberty and property interests.[11]

The petitioner, not the ruling, is solely responsible for clogging the courts by its aggressive request for stays and delays in the application of the law to each litigant. This Court's prompt affirmance of the decision is needed.

(e) At Pet. 15-17, the petitioner misstates that the Ninth Circuit called the in rem statutory forfeiture § 881(a)(6) and "offense" and then the petitioner argued that this "offense" did not have the "same elements" as the criminal offense. Nowhere within the ruling does the Ninth Circuit refer to § 881(a)(6) as an "offense." Rather, the Ninth Circuit stated that in this case the in rem forfeiture statute § 881(a)(6) elected by the petitioner was a "punishment" (not an "offense") imposed on the respondents for precisely the same conduct as their criminal indictment and conviction. Indeed, all the petitioner's pleadings admit this.

(f) At Pet. 16, the petitioner misstates that the ruling below relied on the Blockburger test. The Ninth Circuit did not base its decision on Blockburger since this was not a multiple criminal prosecution or multiple criminal sentence case. Being that this case involved only a civil punishment for the same criminal conviction and offense conduct, the Ninth Circuit relied

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[11] Petitioner's claim of endangered prosecution and convictions is the result of invited error since the prosecution initiated each action. See Pet. 20, 24, n. 6 & &, listing cases on appeal and 2255 motion. It is unlikely that many claims will survive, and if a few defendants obtain relief, it would be warranted depending only on the charging documents and basis for forfeiture. The decision did not hold double jeopardy applied upon a mere seizure as stated by the dissent. The panel specifically stated this decision was based on the facts of this case only. 33 F.3d 1216, 1219, n.8; Pet.App. 7a, 15a n.8.

on Austin to establish that the civil forfeiture was punishment and on Halper and Kurth Ranch to conclude that the Double Jeopardy Clause bars multiple civil and criminal sanctions for the same offense when the civil sanction is not solely remedial but also punitive.

The Double Jeopardy Clause provides three separate protections: 1) protection against reprosecution for the same offense after an acquittal; 2) against prosecution for the same offense after a conviction; and 3) against multiple punishments for the same offense. Halper, supra. At issue here is the third prong, multiple punishments.

The petitioner's double jeopardy argument and issue conflates the three separate prongs of Double Jeopardy Clauses analysis. The decision below is not base don a successive criminal "prosecution" case where there are two criminal trials on two indictments which require the same "elements" test under Blockburger v. United States, 284 U.S. 299 (1932) as insisted by the petitioner. Likewise, the petitioner's "lesser-included offense" test under Brown v. Ohio, 432 U.S. 161 (1972), proposed analysis at Pet. 15-17 is inapplicable here also and only relevant in criminal "prosecutions" to determine if one offense is included within another so to invoke the double jeopardy prohibition against successive "prosecution."

In rem civil forfeiture under statute § 881(a)(6) [and (a)(4) and (a)(7)] is not an "offense" as alleged by the petitioner, but rather a statutory "punishment" for violation in 21 U.S.C. § 801 et. sequence subchapter selected by the government as its grounds for the forfeiture of property. An "offense" is required to be alleged in the civil complaint by the petitioner to use § 881(a)(4), (a)(6), and (a)(7) "punishment," and each section subsumes a drug law "offense" as a predicate.

In a "multiple punishment" case based on a civil in rem statutory forfeiture for the same violation as the criminal prosecution, the test should not be the Blockburger "same element" test but the "multiple punishment" test described in Halper and Kurth Ranch, neither of which relied on Blockburger. A civil forfeiture under § 881(a) is not an "offense:. An offense must be charged by indictment. § 881(a) can only be brought by a civil in rem action and not a criminal indictment (as § 853 may be).

In United States v. Libretti, ___U.S.___ (11/7/95) No. 94-7427, this Court stated "that forfeiture operates as punishment for criminal conduct, not as a separate substantive offense, is demonstrated by the test of the relevant

statutory provisions."

(g) At Pet. 17, the petitioner misstates that the "Ninth Circuit's view that the narcotic and money laundering crimes are necessarily 'included' within the forfeiture 'offense' constitutes a significant departure from the controlling decisions of this Court." The Ninth Circuit ruling does not state anything remotely close to this allegation, and clearly forfeiture is not an "offense," but rather it is a "punishment" under § 881(a)(6) or § 981(a)(1)(A) for the criminal offense in the indictment when the government so states in the civil complaint as it did in this case. 33 F.3d at 1216; Pet.App. 6a-7a.

(h) At Pet. 18, the petitioner misstates that the Ninth Circuit ruling suggests that the civil forfeiture and criminal prosecutions be brought in the same proceeding, then the petitioner explains that this is not possible. The Ninth Circuit did not state such a claim, but rather it encouraged the prosecutors to use the available statutes for criminal forfeiture in the indictment for the criminal charges, or use civil in rem forfeiture for cases the government did not wish to criminally prosecute. 44 F.3d at 1216-1217, 1222; Pet.App. 8a-9a, 22a.

3. There is an appearance of conflict in a minority of the circuits on the Question Presented herein, but there is no conflict with this Court.

The petition should be granted and the decision affirmed because the Ninth Circuit's decision that the Double Jeopardy Clause bars the government from seeking an in rem forfeiture under § 881(a)(6) after the owner has already suffered a criminal conviction for precisely the same conduct and violations alleged in the forfeiture complaint, is not in conflict with the decisions of this Court. Indeed, the Ninth Circuit decision is a direct application of the rulings in Halper, Austin, and Kurth Ranch. The decision was based on the facts of this case and the petitioner's choice of statutes.

(a) Petitioner's attempt to create an appearance of conflict between the Ninth Circuit's decision with those of the Second and Eleventh Circuit is misguided. The Second and Eleventh Circuit decisions relied on in the petition held that separate civil in rem forfeiture proceedings and a criminal prosecution are a "single, coordinated prosecution" for double jeopardy purposes. However, those circuits' decisions were rendered without the benefit of the 1994 ruling from this Court in Department of Revenue of Montana v. Kurth Ranch, supra, where this Court found no significance in the fact that the defendant's criminal and civil tax cases were "coordinated." Furthermore, the

Second and Eleventh Circuits' decisions are distinguishable on their facts and the controlling forfeiture statutes involved.

The Eleventh Circuit case, United States v. One Single Family Residence, 13 F.3d 1439 (11th Circ. 1994) involved a civil forfeiture of the owner's homes and a criminal prosecution for gambling. The statue invoked for the civil forfeiture was 18 U.S.C. § 1955 and not §881(a)(6) as was invoked in the Ninth Circuit's decision. Besides being doubtful after the Kurth Ranch ruling, some judges in the Eleventh Circuit question the Circuit's reasoning in light of Kurth Ranch and the instant Ninth Circuit decision.[12]

The Second Circuit case, U.S. v. Millan, 2 F.3d 17 (2nd Circ. 1993), involved a stipulated settlement combining seized properties in both the civil complaint and the criminal indictment. These facts make Millan unique and very distinguishable from the instant case.[13]

(b) At Pet. 10, the petitioner claims that the Ninth Circuit's decision that civil forfeiture of the proceeds of drug activities is characterized as punishment is in conflict with this Court's precedents and the Fifth Circuit.

In support of this claim the petitioner refers to United States v. Tilley, 18 F.3d 295 (5th Circ. 1994), cert. denied, 115 S.Ct. 573-74 (1994), as a case in conflict with this decision in the Ninth Circuit and the Fifth Circuit cases do have significant distinguishing and dissimilar factual contexts, and that the Fifth Circuit agrees that civil forfeiture based on the criminal indictment does indeed implicate the Double Jeopardy Clause--but the Fifth Circuit incorrectly excluded 21 U.S.C. § 881(a)(6) as a punishment statute because of

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[12] The U.S. v. One Parcel of Real Estate located at 13143 S.W., 872 F. Supp. 968 (S.D. Fla 1944), the judge in denying the claimant's double jeopardy motion opined that "despite the logic of the Ninth Circuit's reasoning [in $405,089.23] this court is bound by the Eleventh Circuit's decision." Id at 972 n.6. The court then found "this Court is constrained to find that his criminal prosecution and the civil forfeiture proceedings involving [claimant's] conduct constitute a single, coordinate proceedings for the purpose of double jeopardy analysis." Id at 972.

[13] In United States v. $145,139.00, 18 F.3d 73 (2nd Cir. 1994), dissenting Judge Kearse concluded that the civil forfeiture of a claimant's money, after he had already been prosecuted and punished for his failure to report the money when leaving the country, violated the Double Jeopardy Clause. The decision never mentioned Millan. A recent Second Circuit decision, United States v. G & P Automotive Corp, 66 F3d 483, 493-499 (2nd.Cir. 1995), favorably referred to "[t]he Ninth Circuit's forceful opinion in $405,089.23...." in light of Austin and Kurth Ranch.

inconsistent reading of the "proceeds" clause. The Tilley's claim involve involve a pretrial agreement in which the defendants stipulated and agree to forfeiture. The district court's order of forfeiture did not specify if the property was proceeds, and the complaint alleged two theories: § 881(a)(6) proceeds and property traceable to proceeds of illegal drug sale, and § 881(a)(7) real property used to facilitate drug trafficking. However, Tilley adamantly claimed his property was just proceeds. The Tilley panel then concluded that the defendants should bear the cost of the entire drug wars, and therefore the forfeiture "fails to compensate fully for the wrongs done from all the drug sales." Id at 299. (Cf. Halper did not pay for "all" medical fraud.)

The Ninth Circuit decision had nothing to do with a settlement or agreement to forfeit assets. Tilley's reasoning on proceeds is inconsistent with the legislative intent of § 881(a)(6) to deter and punish. The Fifth Circuit should resolve their own conflict with the Wood case.[14]

At Pet. 10-11, the petitioner contends that the forfeiture of respondents' assets, cars, plan, shrimp boat, silver bars and money in banks, under § 881(a)(6) is equal to the remedial confiscation of bank robbery process or securities fraud proceeds (which should be restored to their owners). Petitioner has misperceived the confiscatory actions of seizure of robbery and fraud proceeds from a defendant as "forfeiture." Such actions are actually remedial "restitution," or recovery, to make a particular robbery victim whole. Unlike robbery and fraud cases where there is a victim requesting to be mae whole, drug offenses lack a particular victim requesting restitution from the defendant. Therefore, the forfeiture of alleged drug proceeds are both being recovered to make a particular victim whole but rather to punish the defendant for his alleged violations of laws prohibiting drugs. Furthermore, the forfeiture becomes a a payment to the sovereign who profits from the forfeiture of the defendants' assets.

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[14] The Tilley court never tied one dollar of Tilley's money to a specific loss by a specific victim. There was no list of damages of losses. Instead the Court, contrary to its Wood ruling, concluded that a drug defendant must pay the entire drug war cost. The Tilley court did not explain how this was to be implemented, and apparently the local federal agency simply obtained a windfall because the Tilley court made no order of restitution. (Note that in Halper, the Court did not permit the government to have Halper pay the national medial fraud cost to society.)

The petitioner has mistakenly mixed fraud case decisions into its argument that a § 881(a)(6) is a "disgorgement" of property and not punishment "because it only serves to recover a defendant's ill-gotten gains.[15] One case cited by petitioner involved fraud directly upon the government and stock market investors where the "disgorgement order" imposed by the Securities and Exchange Commission was purely remedial in nature for violations of securities laws [not the statutes involved here] and did not constitute punishment within the meaning of the Double Jeopardy Clause, S.E.C. v. Bilzerian, 29 F.3d 689, 696 (D.C. Cir. 1994). Petitioner also relies on United States v. Carson, 52 F.3d 1173, 1182-83 (2nd Circ. 1995), where the defendant was "disgorged" of funds he embezzled from the Union for his salary. The remedial statute in those cases were different than the in rem punishment statute § 881(a)(6) at issue in the petition. Thus, there is no significant statutory conflict with any of the cases cited by the petitioner.[16] Petitioner misperceives the importance o the scope and intent of the particular statute invoked in this case compared to the

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[15] "Ill-gotten gains" are also subject to taxation as income, and to penalties for late reporting. Criminal statutes permit fines to be imposed. Disgorged proceeds go to the fraud victim. In § 881(a)(6), forfeiture proceeds of cars and personal assets go to the sovereign as profits. "Proceeds" is a malleable concept that can be used in different contexts for different statutes. One meaning does not fit all applications as inferred by petitioner.

[16] The brief of amicus curiae from the Commonwealth of Massachuettes et. al., in support of the petition also relies on the alleged conflict on "proceeds" by referring to Tilley Bilzerian, and Carson. The amicus brief, like the petition, fails to notice the difference in the different statutory schemes, in Bilzerian (concerning securities law violations and fraud to investors) and in Carson (a statute to recover embezzled funds). Although Tilley does concern 21 U.S.C. § 881(a)(6) and (a)(7), the amicus brief and the petition both ignore the Tilley panel's conflict with its own contradictory ruling that § 881(a)(6) is definitely a punishment in Wood v. United States, supra. Likewise, the amicus brief and the petition fail to admit that the sovereign takes (a)(6) "process" as pure profit just like it takes assets under (a)(4), (6), or (7) that "facilitated" or were "involved in" an alleged drug transaction. It seems that the petition and amicus brief use words like "process" as a trump card to justify windfall profit in the assumption that "proceeds" will inflame a fact finder to continue the "remedial" fiction. Proceeds from a theft or fraud is far different than proceeds from a prohibited activity in vice offenses or prohibitions. A "proceeds" dollar is just as much profit to the state as any other forfeiture under the same subsection, and not one "proceeds" dollar goes to any metaphysical victim, but rather it is just a perk and a benefit fund outside of the law enforcement agencies normal budge.

fraud case statutes cited by the petitioner. "Proceeds" taken under fraud statutes are for a different purpose than "proceeds" taken under an in rem statute intended in part to deter and punish. Indeed, the Bilzerian and Carson "proceeds" are returned to the defrauded source of the proceeds. Whereas, forfeited § 881(a)(6) process are distributed to law enforcement agencies as profits for their use and to reward informants. See § 881(e)(1).

Similarly, the petitioner's claim of a conflict with United States v. Morgan, 51 F.3d 1105, 1113 (2nd Circ. 1995), is irrelevant since Morgan was trying to use his fraud repayment obligations (a restitution) as a double jeopardy war to his criminal charges of bank fraud. Moran had stolen money. Morgan's case did not involve the in rem forfeiture statutes in the instant case, and it was exclusively a remedial situation of restitution and not of punishment. The money went back to the bank. The Austin test would not help Morgan turn a restitution order into a statutory punishment.

The petitioner claims that the Ninth Circuit decision is inconsistent with United States v. Borromeo, 995 F.2d 23, amended on reh'g, 1 F.3d 219 (4th Circ. 1993). Borromeo should not survive Austin and Kurth Ranch which was decided after Borromeo's rehearing which focused on § 881(a)(7) interpretations. The Borromeo court mistakenly used vague and indefinite "costs to society" theories without itemizing any actual loss to make its generalization on process.

A recent Sixth Circuit case, United States v. Salinas, 65 F.3d 551 (6th Cir. 1995) did disagree with $405,089.23 on the issue of "proceeds" and adopted the Tilley reasoning that focused on the metaphysical "harm inflicted upon the government and society by the underlying criminal act" to find the forfeiture of process "will always be directly proportional to the amount of drugs sold." Id. at 553. Salinas failed to understand that forfeiture is "punishment" if the test of the relevant statute says so. See United States v. Libretti, supra.

There is some conflict with the Sixth and Fifth Circuits on the plain meaning of § 881(a)(6) to deter and punish. Review should be granted and the decision affirmed that § 881(a)(6) in a punishment implicating the Double Jeopardy Clause.

(c) The petitioner cites Witte v. United States, 115 S.Ct. 2199, 2204 (1995) to support his contention that the Blockburger analysis applies to "multiple punishment" claims. Pet. 15. The court in Witte determined that the consideration of relevant criminal conduct at sentencing under the Sentencing

Guidelines § 1B1.3 in a prior criminal case would not prohibit a later indictment for the uncharged conduct. Witte involved two different criminal sentences for different offenses in separate proceedings upon different grand jury indictments. Blockburger analysis was applied to the two criminal cases to determine if the two criminal sentences were for the same indicted offenses. The Ninth Circuit is distinguishable because this decision has to do with one criminal indictment and a later separate civil in rem forfeiture where the government elected to use precisely the same criminal indictment, prosecution, and conviction conduct as grounds for a judgment.

Petitioner mistakenly claims that the Ninth Circuit decision conflicts with Jeffers v. United States, 432 U.S. 137 (1977). Pet. 4, 18. Jeffers dealt with a defendant who requested and was solely responsible for his conspiracy case being conducted separately from his Continuing Criminal Enterprise case, although 21 U.S.C. § 846 is a lesser included offense of § 848 for double jeopardy purposes. If the government had been the cause of Jeffers dual criminal proceedings, the result would have been different. Here, the Ninth Circuit decision was based on the fact that the government elected to bring a civil forfeiture proceedings separately from a criminal prosecution. The respondents have never requested a separate criminal prosecution without criminal forfeiture, or that the conviction be followed by a separate civil in rem forfeiture.

(d) It follows that there is no conflict with the ruling of this Court in Austin in determining whether 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) are not solely remedial, but were intended to deter and punish. The conflict with the Fifth Circuit in United States v. Tilley, supra, is easily distinguishable on the factual contexts based on misreading the text of the § 881(a)(6), and should be handled in the Fifth Circuit because of its own conflict with Wood v. United States, supra.

The conflict with the Sixth Circuit in United States v. Salinas, supra, is also based on a misinterpretation of the text of § 881(a)(6). However, the Ninth Circuit decision is not in conflict with this Court in its reliance on the text of the relevant statutes to determine they are meant to punish. Likewise, the Ninth Circuit decision is not in conflict with the rulings of this Court in Halper, supra, Kurth Ranch, supra, in determining that a separately filed civil in rem forfeiture action and a criminal action based on the same criminal conduct and offenses constitutes separate proceedings for

double jeopardy purposes.

While the petition appears to rely principally on its argument that the res now consists entirely on illegal proceeds, this argument will not escape the legal standard established in Austin. Respondents submit that even a most generous view of the petitioner's claim is unavailing since it ignores the scope of the particular statutes it selected to use against the respondents in seeking criminal and civil penalties. This decision is narrowly applied to those forfeitures elected by the government to go forward under 21 U.S.C. § 881(a)(4), (a)(6) and (a)(7) which are the only § 881(a) statutes enacted "to punish and deter" those involved with prohibited controlled substances, and which contain specific "innocent owner" exception to avoid "punishing" an innocent. There is no merit to claim that any "remedial" forfeiture would be affected. However, to eliminate the conflict, certiorari should be granted and the decision affirmed.

4. The Ninth Circuit fully considered and correctly decided the issues raised by the government below, based on the facts of this case and the precedents of this Court.

(a) The Ninth Circuit relied on United States v. Halper, supra, where this Court considered "whether and under what circumstances a civil penalty may constitute a punishment for the purpose of double jeopardy analysis." 490 U.S. at 436. The Court fashioned the following test: "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, in punishment." Id at 448-49. Specifically, the Court held that the Double Jeopardy's prohibition against multiple punishment for the same offense was violated when "a defendant who already has been punished in a criminal prosecution may not be subjected to an additional sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." Id at 449.

The Ninth Circuit followed the instructions of Austin v. United States, supra, where the Court relied heavily on the rationale of Halper to determine civil forfeiture pursuant to 21 U.S.C. § 881(a)(4) and (7) constitutes punishment for purposes of the Eight Amendment's Excessive Fine Clause. Austin, 113 S.Ct. at 2806. However, rather than focusing, as the Court had in Halper, on the goals of the sanctions in the individual case, the Austin Court reasoned that in the forfeiture context it made more sense to focus on the forfeiture statute as a whole because "[t]he value of the conveyances and real

property forfeitable under § 881(a)(4) and (a)(7),...vary so dramatically that any relationship between the government's actual costa nd the amount of sanction is merely coincidental." Austin, 113 S.Ct. at 2812, n.14. See also Kurth Ranch, 114 S.Ct. at 1948, (focusing in goals of tax statute as a whole). The Court concluded that forfeitures under § 881(a)(4) and (7), are properly considered punishment because : (1) nothing in the section contradicts the historical understanding of forfeiture as imposing punishment; (2) the sections focus on the owner's culpability by providing for the "innocent owner" defense and by typing forfeiture directly to the commission of drug offenses; and (3) Congress understood the section as serving the goals of deterrence and punishment. Austin, 113 S.Ct. at 2810-11.

The Austin Court's historical analysis of forfeiture as punishment and its reliance on the legislative history of § 881 are equally applicable in the instant case dealing with § 881(a)(6).[17]

The Ninth Circuit observed that like the sections of the forfeiture at issue at Austin, § 881(a)(6) also includes an innocent owner defense, which focuses on the culpability of the owner in a way that makes it look more like punishment. See Austin, 113 S.Ct. at 2810-11. Also, § 881(a)(6)'s conditioning of forfeiture on a violation of the Controlled Substance Act is also indicative of Congress' intent to deter and punish. See Id. at 2811.

The Ninth Circuit court held that the government violated the Double Jeopardy Clause by obtaining criminal convictions against the respondents and then continuing to pursue the in rem forfeiture action based upon the same conduct and violations prosecuted in the respondents' indictment. The court concluded by discussing the practical effect of Austin on the government's prosecution of cases:

> Because in the case of statutes like those before us a criminal prosecution and a forfeiture action based on the same offense must now be brought in the same proceeding--that is, the same indictment--the government will often be forced to choose whether to include a

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[17] The following are subject to forfeiture under § 881(a)(6): All monies, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for controlled substances in violation of this subchapter, all proceeds traceable to such exchange, and all monies, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of any owner, by reason or any action or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner. 21 U.S.C. § 881.

> criminal forfeiture count in the indictment (and thus forego the favorable burdens it would face in the civil forfeiture proceedings) or to pursue only the civil forfeiture action (and thus forego the opportunity to prosecute the claimants criminally). If in such cases, the government wishes both to obtain forfeiture and to impose other forms of criminal punishment, it 'will have to rely to a much greater extent on criminal forfeiture.' It is entirely reasonable to put the government to this choice. After Austin, the law requires it.

33 F.3d at 1222 (citation omitted). Pet.App. 22a. The Ninth Circuit's reasoning is logical. The government is not at all disadvantaged.

(b) Congress in enacting § 881(a)(6) gave the government the opportunity to punish and deter individuals who could not be criminally indicted or convicted because of the lack of evidence and would otherwise go unpunished for their criminal activities. Prior to the enactment of § 881(a)(6), law enforcement could not seize assets that were believed to be "proceeds" of illicit drug activities. § 881(a)(6) is a weapon in the war on drugs and not a "remedy" for the victims.

The petition does not find any support to its theory in the legislative history of § 881(a)(6). The petition does not claim that Congress enacted § 881(a)(6) to "remedy" society. Legislative history is conspicuously absent from the petition because it goes against the petition's position that § 881(a)(6) is not punishment. The petition and the amicus brief rely on the influence and visceral appeal of the catch-phrases "drug proceeds" or "ill-gotten gain" to avoid the clear purpose and intent of Congress that § 881(a)(6) forfeitures are "to deter and punish." Legislative history does not support the petitioner in this case.

The petitioner has previously acknowledged that the purpose of taking drug profits is to deter and punish. In Austin, this Court noted that the same petitioner had used the legislative history of § 881(a)(7) in its brief in United States v. 92 Buena Vista, Rumson, 507 U.S. ___, 122 L.Ed. 2d 469, 113 S.Ct. 1126 (1993)(Brief for the United States in No. 91-781, pp 41-42) that Congress recognized "that the traditional sanctions of fine and imprisonment are inadequate to deter and punish the enormously profitable trade in dangerous drugs." S.Rep. No 98-225. p. 191 (1983). See Austin, 125 L.Ed.2d at 504, n.13. Thus, forfeiture under (a)(7) was to "deter and punish" for "profitable" trade in dangerous drugs, i.e., to punish for profit making on drugs by forfeiture of the profits, or proceeds. However, in the instant case, the petition fails to discuss any legislative history of any § 881(a) statute to support its new theory that forfeiture of the profits, or proceeds. However, in the instant

case, the petition fails to discuss any legislative history of any § 881(a) statute to support its new theory that forfeiture of the profits (i.e., proceeds) of the drug trade is not punishment, but some sort of metaphysical remedy to society (even though it goes to the raiding agency's coffers a as a windfall for official, personal consumption, informants, rewards and agency sharing. § 881(a).

The legislative history of 6 881(a)(6) makes clear that when Congress expanded civil in rem forfeitures to include "proceeds" in 1978, the joint House and Senate committee expressly and specifically recognized the "penal nature" of the section. Thus, § 881(a)(6) is not "wholly remedial," and it does serve in part to punish:

> "The...[1978] amendment expands...the Action [§ 881(a)(6)] to provide for forfeiture of the following additional type of property: (1) All monies, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for illicit controlled substances; (2) all process traceable to such for exchange for illicit controlled substances; and (3) all monies, negotiable instruments and securities used or intended to be used to facilitate any controlled substance law violation. **Due to the penal nature** of forfeiture statutes, it is the intent of these provisions that property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity that the statute seeks to prevent. Specifically, the ...amendment provides for the forfeiture of property exchanged or intended to be exchanged in an illegal drug transaction. In addition, it provided for forfeiture of property which is the proceeds of an illegal drug transaction... Finally, it should be pointed out that no property would be forfeited...to the extent of the interest of a innocent owner of such property." [Joint Explanatory Statement of Title II and III, 124 Cong.Rec. 17547 reprinted in 1978, U.S.C.C.A.N. 9518 (Emphasis added).

Thus, the Ninth Circuit decision was consistent with the purpose of § 881(a)(6). The legislative history of § 881(a)(6) shows Congress' intent to deter and punish.

(c) In the instant case, the Ninth Circuit reasonably relied on Austin and Halper in holding that civil forfeiture pursuant to 21 U.S.C. § 881(a)(6) constitutes punishment which triggers the protection of the Double Jeopardy Clause, 33 F.3d 1219; Pet.App. 15a. Cf. United States v. Ursery, 59 F. 3d 568 (6th Cir. 1995) (holding that civil forfeiture pursuant to § 881(a)(7) followed by criminal conviction for the same offense constituted double jeopardy). The Ninth Circuit reasoned that:

> "the only fair reading of the Court's decision in Austin is that it resolves the 'punishment' issue with respect to forfeiture cases for purposes to the Double Jeopardy Clause as well as the Excessive Fines Clause. In short, if a forfeiture constitutes punishment under the Halper criteria, it constitutes 'punishment' for purposes of bother clauses."

33 F.3d at 1219. Pet.App. 15a.

The instant Ninth Circuit case is narrow, like Halper. The "multiple punishment issue before us is narrowly framed by the common understanding of the parties of this case. They do not dispute that [respondents] already [have] been punished as a result of [their] prior criminal proceedings [they were] punished to a jail term[]. Nor do they dispute that the instant proceeding and prior criminal proceeding concern the same conduct[]." United States v. Halper, 490 U.S. at 441. "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense." Ex parte Lange, 18 Wall 163, 168, 21 L.Ed. 872 (1974)." Id. The Ninth Circuit case below is procedurally identical to Halper.

The Ninth Circuit decision did not change anything in "multiple punishment" analysis where a civil and criminal penalty are the judgments involved. See Halper, supra; and Kurth Ranch, supra. The sustain this double jeopardy challenge under the multiple punishment prong, the Ninth Circuit Court found: (1) two judgements of punishment, (2) imposed in two separately docketed actions (3) for precisely the same conduct charged in the criminal indictment and prosecution, and (4) against the same defendants (the respondents herein).[18]

(d) The government's (petitioner and amici) ability to label most forfeiture properties as "proceeds" seems to have no limit in practical application. In the instant case, the government could not tie any property to a specific illegal act, and no property was illegal in itself. Nonetheless, the government merely alleged "proceeds" and based its burden of proof for forfeiture solely on the same indictment charges and criminal minutes.

To accept petitioner's argument that a statute enacted by Congress specifically to "deter and punish" persons who obtain proceeds from or "traceable to a drug transaction is "remedial", would be to negate legislative intent to deter and punish, the language of the statute, and continue a fiction

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[18] Importantly, it should be irrelevant which sovereign conducts the criminal prosecution or the civil in rem forfeiture action when the above four elements are met, because then the Double Jeopardy Clause should prohibit the second punishment. Tactical dual criminal-civil punishments under the fictive "dual sovereignty" doctrine are still punishments by law enforcement acting in harmony, and if based on the same conduct, then a violation of the Fifth Amendment has occurred. "See, United States v. All Assets of G.P.S. Automotive Corp., 66 F.3d 483, 493-499 (2nd Circ. 1995.

that such forfeitures do not really punish the guilty owner. The owner of forfeited property surely feels punished by the loss. There is no drug customer requesting restitution "to made whole" from a theft or fraud.

When the penalty to the owner under § 881(a)(6) becomes mere profit for sovereign rather than restitution to victims as in fraud cases, the forfeiture is not remedial.[19] When the forfeited items of "proceeds" are not illegal in themselves, like money in the bank, vehicles and property, the forfeiture penalty is still a windfall to the sovereign and not remedial as are the removal of illegal regulated items for public safety, such as forfeitures of firearms, drugs, or chemicals. (I.e., United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984)).

(d) The Ninth Circuit correctly rejected the petitioner's reasoning o Austin and Halper.

The petition also contends at Pet. 14 that under Austin, only civil forfeiture that are found to be excessive are to be considered punishment. However, the Ninth Circuit showed that the government's argument not only misconceived the legal standard established in Austin, but also it misstated the scope of the statues involved. 33 F.3d 1220; Pet.App. 18a. Austin held that all forfeiture under § 881(a)(7) are meant in part to punish and therefore can run afoul of the Excessive Fines Clause. Austin, 113 S.Ct. at 2812. The Austin court left the issues of whether the forfeiture was constitutionally excessive to the district court in the first instance. Id.

At Pet. 10, the government also contends that the applicant of Halper is for the "rare case where the civil action was overwhelmingly misproportional to the damages caused by the wrongful conduct of the respondents. Thus, petitioner concludes that the instant in rem forfeiture of respondents' property does not constitute punishment. However, in Austin, the Supreme Court found that such a test was inapplicable in a forfeiture setting, and instead

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[19] See Black's Law Dictionary, Sixth Edition, page 1294, Remedial laws or statutes: ("The underlying test to be applied in determining whether a statute is penal or remedial is whether it primarily seeks to impose an arbitrary deterring punishment upon any who might commit a wrong against the public by a violation of the requirements of the statute, or whether the purpose is to measure and define the damages which may accrue to an individual or class of individuals, as just and reasonable compensation for a possible loss having a casual connection with the breach of the legal obligation owing under the statute to such individual or class.")

looking to the purpose behind the forfeiture statute itself, concluded that forfeiture serves in part to punish. 113 S.Ct. at 2812, n.14. In the forfeiture context it does not make sense to compare the amount seized with the government's damages and actual costs; the value of the property seized is purely fortuitous, and thus "any relationship between the government's actual cost and the amount of the sanction is merely coincidental." Austin, 113 S.Ct. at 2811-12, n.14. Moreover, the government had failed to demonstrate on the record how the forfeited property related to any damage or even its cost of investigation and prosecution of respondent' criminal case.

Finally, at Pet. 18, the government argues that to the extent that the forfeiture in the instant case can be considered punishment, it is punishment imposed against the property itself and not against the owner of the property. However, the Supreme Court in Austin stressed that it has consistently recognized that in rem forfeiture serves, at least in part, to punish the owners. 113 S.Ct. at 2810. Moreover, the Court made clear that forfeiture of property such as vehicles and real estate under the current forfeiture statute is dependent not on the criminal nature of the property but on the illegal use their owners make of them. Austin 113 S.Ct. at 2810-11. The same reasoning applies to illegal used vehicles, assets or monies forfeited under § 881(a)(6). Thus, it is the owners who are punished by the forfeiture of such property. Id at 2811.

This Court in Halper addressed the question of what constitutes "punishment" for the purpose of the Double Jeopardy Clause. 490 U.S. at 436. The Halper court announced that the property inquiry is whether the sanction serves the goals of punishment, I.e., retribution or deterrence. Id. at 448.[20] In Austin, the Court held that Congress intended for the forfeiture of property pursuant to § 881(a)(4) and (a)(7) to "deter and punish." See Austin, 113 S.Ct. at 2811. Similarly, as previously discussed, Congress intended § 881(a)(6) to deter and punish. Therefore, forfeiture pursuant to § 881(a)(6) should also constitute punishment for purposes of the Double Jeopardy Clause.[21]

(f) The Ninth Circuit correctly followed precedent to determine that §

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[20] It is significant that neither the Halper or Kurth Ranch decision on "multiple punishment" placed any reliance on the Blockburger analysis, supra at 22-23.

[21] 18 U.S.C. § 981(a)(1)(A) is nearly identical and has an innocent owner provision in (a)(2).

881(a)(6) is categorically punishment. The petitioner's insistence that § 881(a)(6) is not categorically punishment because of its "proceeds" clause is foreclosed by the rulings from Halper and Austin to determine if statute § 881(a)(6) was "punishment". Section 881(a) had eleven civil forfeiture statutes which can be divided into two categories, one remedial and the other punitive.[22]

The first category includes property which is dangerous and/or illegal per se and thus subject to destruction or removal from society. The forfeiture of such dangerous or regulated property cannot constitute punishment for purposes of the Double Jeopardy Clause because its forfeiture may be characterized as "remedial" and not "deter and punish." This category of § 881(a) includes (a)(1), all controlled substances which have been manufactured, distributed, dispensed, or acquired; (a)(2), all raw materials, products, and equipment which are used in manufacturing any controlled substance, all property which is used as a container; (a)(3), all books, records, and research, including formulas, microfilm, tapes, and data which are used in violation of this subchapter, § (a)(5); (a)(8), all controlled substances which have been possessed in violation of this subchapter, § (a)(8); (a)(9) all listed chemicals, all drugs manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, § (a)(9); § (a)(10) any drug paraphernalia; and § (a)(11) any firearm, § (a)(11).

The items included in the first category are either illegal per se and/or dangerous to society in general or to law enforcement agents in particular. The Austin court conceded that "the forfeiture of contraband itself may be characterized as remedial because it removed dangerous illegal items from society." 113 S.Ct. at 2811 (citing United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1994), which involved forfeiture of firearms). Indeed, Congress recognized that such property is dangerous by providing for its summary forfeiture and destruction. Specifically, Section 881(f)(1) provides that all controlled substances, all raw materials, and any equipment or container subject to forfeiture, which cannot be separated safely from such raw

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[22] The issue involved here does not address the confiscation of property that a defendant does not have title to, i.e., stolen property, is punishment for double jeopardy purposes. The government can immediately confiscate such property and is not required to institute forfeiture proceeding. The government seizure of stolen property for return to the owner should not involve in rem forfeiture action.

material or product, shall be deemed contraband and summarily forfeited to the government to destroy such property. See also H.R. Rep. No. 101-681(I), 101st Cong., 2d Sess. (1990) reprinted in 1990 U.S.C.C. A.N. 6472, 6506 (providing for summary forfeiture and destruction of dangerous substances and the equipment or containers from which the substances cannot be safely separated "because of the dangers they create for law enforcement agents"). Similarly, Congress provided that the selling and interstate transport of drug parapherna is illegal, § 863(a), and that drug paraphernalia is subject to seizure, forfeiture, and destruction. § 863(c).

The second category consists of property forfeited pursuant to § 881(a)(4), (6), (7), which are lawful items whose forfeiture is intended to deter and punish the owner for violations of law.

Under § 881(a)(6) there are three categories of property subject to forfeiture: a facilitation provision, an exchange provision, a proceeds provision (which itself has distinguishable categories of actual, direct, indirect and derivative "proceeds"); and an innocent owner provision.

The petitioner argues that the "proceeds" clause of the statute § 881(a)(6) should be singled out and excluded from the concept of "punishment". The petitioner's argument conflicts with the intent of the legislature when it enacted § 881(a)(6) to punish and deter those involved with illegal drug activity. The problem with the government's attempt to exclude the process clause from the punitive categorization of § 881(a)(6) is that there is no limit to what the government could claim was "proceeds." As in the instant case, the brush it uses paints too wide a stroke. Continual hair-splitting arguments could prolong litigation on what is, or is not, "proceeds" if the § 881(a)(6) is not also categorically "punishment" as intended by the statute and under the analysis of Austin. It is not too unlikely that if § 881(a)(6) "proceeds" in general was determined to somehow be "remedial" and not to be punished, then most future § 881(a) civil forfeitures would likely be alleged as "proceeds" and separate civil and criminal cases for the same violations would continue to be the elected advantageous strategy.

As used in § 881(a)(6), the word "proceeds" means property derived from money (or other things of value) directly exchanged for drugs, i.e., property acquired with profits of drug trafficking. "The cash directly acquired in exchange for the drugs is not the "proceeds", it is the 'moneys...furnished...in exchange for a controlled substance' forfeited under

the exchange provision. If the cash acquired is exchanged for drugs is used to purchase a house and the house is later sold for cash, that cash is "proceeds" under § 881(a)(6) but the original cash obtained from the sale of the drug is not.

Unfortunately, the limit of "proceeds" is unknown and arbitrary. "If a house were received in exchange for another house, would the traceable proceeds consist of the first house, the second house, or both, with the government having an election between the two? United States v. 92 Buena Vista Ave., Rumson, N.J., 507 U.S.___, 113 S.Ct. 1126, 1138, 122 L.Ed.2d 469 (1992). It seems that no matter how many times the property changes form it still remains "proceeds" subject to forfeiture if the government can claim a drug connection in the past. But the tracing, as in the instant case, is purely speculation. "Following such a trail is often neither sensible or practical. There comes a time when two items of property, though logically connected by a long string of transactions, are too remote one from the other to justify forfeiture, and therefore cannot be termed traceable to or derived from one another.," In Re Moffit, Zwerling & Kemler, P.C., 875 F.Supp.; 1152, 1160 (E.D. Va. 1995). Tracing, philosophically, could go forward to eternity.[23]

As this Court made clear in Buena Vista:

> "We are not aware of any common-law precedent for tracing proceeds traceable to an unlawful exchange as a fictional wrongdoer subject to forfeiture..." [See U.S. v. Buena Vista, 507 U.S. ___, ___, 122 L.Ed.2d 469, 483, 114 S.Ct. ___(1993)"

It was not until the 1978 Amendments to the Comprehensive Drug Abuse Prevention and Control Act of 1970, that Congress, for the first time, provided for the forfeiture of "proceeds" and at the same time provided an "express and novel protection for innocent owners," by which only "proceeds" owned by guilty individuals could be subject to forfeiture. See U.S. v. Buena Vista, 122 L.Ed.2d at 480-481.

Thus, under these new amendments, which for the first time provided for

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[23]"Analogously, in the context of tort law, courts long ago recognized that factual or 'but for' causation, taken to its logical extreme, extends legal liability too far, for '[i]n a philosophical sense, the consequences of an act go forward to eternity.' Keeton, et. al., Prosser & Keeton on the Law of Torts, 264 (5th Ed. 1984). Thus, under the heading of 'proximate' causation, courts set boundaries on tort liability according to 'some social ideal od justice or policy.' Id. Likewise, the concept of tracing reaches must further in logic than it should in practice." In Re Moffitt, Zwerling & Kemler, P.C., 875 F.Supp. at 1160, n. 27.

the forfeiture of "proceeds" and an "innocent owner" defense, only those individuals who are themselves guilty "of a violation of this subchapter" will suffer punishment of forfeiture of their property.

And again, in Austin, 125 L.Ed.2d at 503-04 this Court held that:

> "[T]he inclusion of innocent-owner defense in §§ 881(a)(4) and (a)(7) [like the identical worded § 881(a)(6)] reveals a similar congressional intent to punish only those involved in drug trafficking."

Accordingly, there is the same legislative intent and reason to characterize the forfeiture of "proceeds" as "punishment" as there is for other property that may have been used to "facilitate" a drug offense under § 881(a)(6).

Although viscerally appealing, the forfeiture of "proceeds" of vehicles, property or assets alleged to be from or traceable to drug transactions, under § 881(a)(6), is no less a punishment to the owner than forfeiture of vehicles, property, or assets under § 881(a)(4) and (a)(7). Moreover, the police and federal agencies consume the forfeited "proceeds", vehicles and property the same way under (a)(6), as they do under (a)(4) or (a)(7). A vehicle forfeited under (a)(6) or (a)(4) is the same profit to the sovereign and is not remedial to anyone. Curiously, the petition and amicus brief neglects to mention their profit motive.

Thus, the most sensible and economical method, as well as that which is consistent with legislative intent and precedent of this Court, is to find that § 881(a)(6) is also categorically "punishment."

Accordingly, prompt review by this Court and affirmance of the decision below is requested in order to settle the Question Presented herein.

5. It is important that the petition be granted and the decision below affirmed because of the salutary effects and economy benefits to the administration of justice resulting from the decision.

The salutary effects and economic benefits of the Ninth Circuit's decision are significant in the area of judicial and prosecutorial economy, property rights, constitutional rights of innocent and guilty owners of property involved in seizure, and restoration of integrity to the asset forfeiture program.

(a) The federal and state prosecutors are now routinely bringing their asset forfeiture action within the criminal indictment, or by civil in rem forfeiture proceedings, but not both. There will be tremendous savings if prosecutors only have to docket and prepare one case instead of two or more on

the same criminal allegations. It is likewise logical that prosecutors will enjoy huge savings in man-hours previously wasted on conducting dual civil and criminal proceedings against the same defendant. Adding a criminal forfeiture count to the proposed indictment for the grand jury is already a well-established practice.

Court clerks will save time and money with less new civil forfeiture dockets to manage when criminal forfeiture counts are brought in the criminal indictment.

Judicial economy is a logical result when only one action is brought to forfeit property, either by criminal indictment and prosecution, or in a civil proceedings. Previous to the Ninth Circuit, decision, two judges were often involved in the same claim. It is economical to have one district judge handle the government's action for civil forfeiture, or criminal indictment with a forfeiture count.

It is beyond dispute now that the government can obtain all the relief it wishes, both in a criminal sentences and property forfeiture, in one proceedings.

(b) The petitioner's use of dual criminal and civil proceedings to punish persons involved in drug law violations has radically shifted the ownership of real and personal property from citizens to the government for its use. The government can seize real and personal property and place the burden of the owner to provide his lack of guilt. there is no appointment of counsel for civil forfeiture of property at this time. The area of property law and property rights had become unstable when the petitioner can bring repeated actions for property forfeiture after criminal punishment. Alienability of property has been adversely affected. Private property is taken for official use. The Third and Fifth Amendments of the Constitution are noteworthy. "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in manner to be prescribed by law." Amendment III (1791). "No person...nor be deprived of life, liberty, or property, without due process of law;nor shall property be taken for public use, without just compensation. Amendment V (1971).

The petitioner asks this Court to wink at what is really going on, and to continue a fading historical fiction that a forfeiture action is one against inanimate property rather than the guilty owner.

There is a need for scrutiny of forfeiture doctrine. It has been

commented by this Court that, "[i]ndividual freedom finds tangible expression in property rights." U.S. v. James Daniel Good Real Property, 114 S.Ct. 492, 505 (1993); Id at 515 (Thomas, J. concurring in part and dissenting in part).

"Any system that wishes to protect freedom, has to protect property."[24] The Second Circuit has stated that it "continue[s] to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes." United States v. $31,990 In United States Currency, 982 F.2d 851, 856 (2nd Cir. 1993).

The Ninth Circuit's decision has injected an element of stability and certainty into the area of property rights of persons accused of a drug or money laundering crime. Now, there will be only one proceeding for the properties and the crime.

(c) The salutary effects of the Ninth Circuit's decision on Constitutional rights and a reappearance of integrity into the judicial system are already noticeable. The petitioner has lost nothing. The petitioner has merely brought the forfeiture and criminal charges in the indictment for a determination in one proceedings, in compliance with the Fifth Amendment so "that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts." $405,089.23, 33 F.3d at 1215, [Pet.App. 6a] quoting Abbate v. United States, 359 U.S. 187, 188-89 (1959) (Opinion by Brennan, J.).

The decision is important to those accused of a drug law violation since the accused cannot effectively protect his property rights and liberty interest from a jail cell. Be requiring a defendant to "marshal his resources" for defenses of his liberty in the criminal prosecution, and to again "marshal his resources" in the separate forfeiture proceedings to protect his property rights from the same claim is exactly the protections provided for under the Double Jeopardy Clause. The failure to "marshal his resources" to fight the civil forfeiture of property because the state will not provide counsel except for the criminal prosecution, causes many defendants to lose valuable real and personal property simply because of the elected manipulative strategy of the petitioner to conduct dual proceedings against the defendant for the same cause of action.

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[24] George C. Pratt & William B. Peterson, Civil Forfeiture in the Second Circuit, 65 St. John's L. Rev. 653 (1991).

In the instant case, the petition should be granted and the decision affirmed in order to restore the tarnished appearance of integrity in the forfeiture laws. Unfairness and overreaching have been the trademark and image of the petitioner's and amici's asset forfeiture programs since big profit is the motivation to us in rem forfeiture actions based on the same conduct that a defendant is criminally indicted and prosecuted for. The petitioner's and amici's claim of "chill" and impairment to their asset forfeiture programs can most charitably be called "transparently fallacious."

(d) The petition and amici brief in support of the petition urge suspension of a constitutional right so that they can maintain profitable programs by shortcuts that give them tremendous procedural advantage in dual proceedings from the same action against same person. There is an appearance of unfairness and a conflict of interest.

The drug war's asset forfeiture program have been utilized by the petitioner to amass billions of dollars in seized properties based on probable cause that the owner had violated one of the drug laws. The news medical is frequently reporting cases of abusive tactics and losses of real and personal property of innocent owners. Id. Property rights traditionally have been an important area of law and are protected by Constitutional guarantee against a "taking" without due process. Homes are seized under the drug laws with a great deal less protection and procedural safeguards than a condemnation proceedings or as an exercise of eminent domain.

The use of civil statutes for punishment of crime raises genuine civil liberties issues, and when confiscation of property is the punishment, deeply rooted property rights issues arise. The government's overzealous forfeiture efforts have recently been criticized by the courts, the medica, legal commentators, bar associations, civil liberties organizations, some members of Congress, and even some prosecutors responsible for leading and directing the federal forfeiture program. After many years of relentless expansion, the forfeiture laws are in for a long overdue review by the courts. There is a widely perceived need to reform these laws and the way they are being implemented to make them fairer and to prevent the kind of abuses that have occurred regularly. See 1 David B. Smith, Prosecution and Defense of Forfeiture Cases, ¶ 1.02, 1-18 to 1-22 (1995).

Since 1990, media coverage of forfeiture actions by the government has turned distinctly negative focusing on the victims of overzealous forfeiture

efforts and unfairness of civil forfeiture proceedings.[25] Id.

The Comprehensive Crime Control Act of 1984 earmarked forfeiture assets exclusively for law enforcement purposes. See 28 U.S.C. § 524. prior to 1984, the proceeds from forfeited assets were deposited in the general Treasury. The allotting of forfeited assets for law enforcement purposes provided a tremendous incentive to seek forfeiture simply to raise revenue for law enforcement agencies. The interest of justice and traditional law enforcement priorities were soon slighted in the government's overzealous pursuit of forfeiture. The priorities of state and local law enforcement to share its forfeiture booty with cooperating state and local law enforcement agencies. See 19 U.S.C. § 1616.[26] Thus, the earmarking of forfeiture assets for the benefit of local law enforcement agencies that seize the property has been criticized by some judges because of the built-in conflict of interest inviting

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[25] How the Long Arm of the Las Can Seize What It Wants, The Philadelphia Inquirer, Feb. 18, 1990, at 1-A; Drug Raids Net Much Valuable Property--and Legal Uproar, The Washington Post, April 1, 1991 at A1; Small Amounts of Drugs Can Put Driver's Cars Behind Bars, The News and Observer, July 30, 1990, at A1; Presumed Guilty--The Law's Victims in the War on Drugs, The Pittsburgh Press, Aug. 11-16, 1991 (seven part series of articles); Special Report: Abusing Forfeiture Laws: Are Seizures "Legalized Theft"?, USA Today May 18, 1992, at A-1; Forfeiture Laws Seize National Scorn, Orlando Sentinel, Aug. 2, 1992, at A-1; Where the Innocent Lose, Newsweek, Jan. 4, 1993 at 42-43; Civil Forfeiture Laws are Under Attack, Wall Street Journal, Jan. 14, 1993, at B-1; Reining in Property Seizures by Police, March 22, 1993 at 1; The Law Goes on a Treasure Hunt, The New York Times Magazine, Dec. 11, 1994; $60 Million Theft by Sheriff's Deputies Alleged, L.A. Times, April 1, 1993 at B1; Special Report: The Forfeiture Racket, by Gary Webb, San Jose Mercury News, Aug & Sept. 1993 (Weapon in Drug War Bludgeons Innocent); Widespread Abuse Taints Anti-Drug Law, Aug. 29, 1993; The Money Tree, Aug. 30, 191; Police Lobbying to Save State Asset Forfeiture Law, Sept. 7, 1993; Vote Set Today on Measure to Limit Asset Seizures in Drug Cases, Sept. 1993; Lawmakers Revoke Cops' Asset-Seizing Powers, Sept. 11, 1993); Tainted Cash or Easy Money, Orlando Sentinel, June 14, 1992 at A-1; The Thin Green Line, California Lawyer, September 1994, at 48-49; Why Good Cops Go Bad, Newsweek, Dec. 19, 1994 at 30-34; Asset Forfeiture, Once Sacrosanct, Now Appears Ripe for Reform, Legal Times, July 5, 1993 at 21; Uncle Sam Wants Your Stuff: Is Asset Forfeiture Another Term For Theft, by J. Bovard, Playboy Magazine, October 1995, at 45-47.

[26] See also, Attorney General's Guidelines on Seized and forfeited property.

overreaching.[27] United States v. That Certain Real Property, 798 F.Supp 1540 1551 (N.D.Ala. 1992); Jones v. Drug Enforcement Administration, 819 F.Supp 698 (M.D.Tenn. 1993); United States v. Currency in the Amount of $150,660.00, 980 F.2d 1200, 1208 (8th Cir. 1992)(Bright, J., dissenting). Recently, one judge suggested it was time to reevaluate dual sovereignty fiction in federal-state criminal-civil forfeiture dual actions arising from joint operations on the defendant and offense. United States v. G & P Automotive, LLR 1995, U.S. 2nd Cir. 416, Subsection II b.2 separate concurrence by Calabresi, J., citing United States v. Grimes, 641 F2d 96, 101 (3rd Cir. 1981).

Thus, the petitioner and the amici prosecutors supporting the petition are vigorously arguing that their profit-making asset-forfeiture programs should not be hampered by the Constitution. By merely labeling a forfeiture "proceeds," the petitioner and amici hope to continue a fiction that loss of property rights, based on a criminal violation allegation, is not a punishment of the guilty owner. The petition has artfully avoided discussing its profit motive in this action. The petitioner and amici want this Court's blessing to seek profit by ignoring the text of the statute and legislative intent that forfeiture of property rights under § 881(a)(6) is a punishment.

The petitioner and the amici have significant, direct, pecuniary interests in maintaining their unfettered and uncontrolled asset-enrichment programs without regard to the protection of the Constitution for individual liberty and property interests. Since there is "equitable sharing" of the loot (see footnote 27 supra), there is no rational reason that the same petitioner and amici could not have conducted asset forfeiture in a single proceeding, either by criminal forfeiture statutes in the criminal indictment, or by civil action to punish the non-indicted property owner.

CONCLUSION

The petition and the amicus brief understandably do not mention all the circuits which have agreed with the Ninth Circuit, and the effect of Halper, Austin, and Kurth Ranch. Independently, the Seventh Circuit reached a similar conclusion in United States v. Torres, 28 F.3d 1463 (7th Cir. 1994). See also,

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[27] By Fiscal Year 1990, the Justice Department was doling out about $200 million a year to state and local police and sheriff's departments nation wide through the "equitable sharing" programs. See 1 David B. Smith, Prosecution and Defense of Forfeiture Cases, ¶ 1.01, at 1-8. Understandably, the amicus brief does not mention its financial stake.

United States v. Ursery, 59 F.3d 568 (6th Cir. 1995); United States v. Baird, 63 F.3d 1213 (3rd Cir. 1995) No 95-1202 (where the principle of law was affirmed, but the defendant lost because of the facts of that case). The District of Columbia Circuit recently recognized that Austin and Kurth Ranch required it to change its prior holding that The Double Jeopardy Clause did not apply to proceedings under 21 U.S.C. § 881(a)(6) in United States v. Rhodes, 62 F.3d 1449, 1452 (D.C. Cir. 1995).

If the petitioner's and amici's profit-motivated programs of asset forfeiture are "chilled" because of the Constitution as they claim, then those programs must be corrected to meet constitutional muster to protect citizens' liberty and property interests. The statutory tools already exist to accomplish the task correctly and that the petitioner and amici can properly accomplish asset-forfeiture and have the rewards. The petition should be granted and the decision below affirmed on the merits.

Dated: November 21, 1995

Respectfully submitted,

/s/
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Legal research and document preparation
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APPENDIX A

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. $405,089.23 U. S. CURRENCY; $8,929.93 U. S. CURRENCY; $123,000 U.S. CURRENCY; ONE BELL 47 G-2 HELICOPTER, U.S. Registration Number N59H; STORMY SEAS FOUR (SHRIMP BOAT) official number 2159; ONE PIPER CHEROKEE 6 AIRPLANE; ONE HUNDRED THIRTY-EIGHT (138) SILVER BARS; ONE 1985 JAGUAR, VIN: SAJNV5842FC119348; ONE 1981 WELLCRAFT, VIN: HALLWELT1593G788; ONE 1988 JAGUAR, VIN: SAJHU164JC530324; ONE 1986 PORSCHE, VIN: WPOAA0940GN454897; ONE 1988 JAGUAR, VIN: SAJAV1643JC521364; ONE 1986 CHEVROLET, VIN: 1G8CS18RXG0140772; ONE 1988 MITSUBISHI, VIN: JA7FL24D9JP0505914; ONE 1987 NISSAN, VIN: JN6ND11S3HW033709;	No. CV 91-3264 AWT(EEx) NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF MARK A. FELDMAN

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ONE 1987 SUZUKI, VIN: 1S4JC51C2H4154485; ONE 1988 Jeep, VIN: 2BCHV8157JB523469; ONE 1988 Chevrolet, VIN: 1GCFC24K0JZ253793; ONE 1983 Chevrolet, VIN: 1G8CS18B9D8132968, Defendants.	Date: December 28, 1992 Time: 10:00 a.m. Place: Courtroom of the Honorable A. Wallace Tashima

NOTICE IS HEREBY GIVEN that on December 28, 1992 at 10:00 a.m., or as soon thereafter as the matter may be heard in the courtroom of the Honorable Judge A. Wallace Tashima, United States District Judge, located at 312 North Spring Street, Los Angeles, California, the United States of America, plaintiff, will move for Summary Judgment on its Complaint for Forfeiture herein. This motion is made on the grounds that there are no genuine issues of material fact. Accordingly, plaintiff is entitled to judgment as a matter of law.

The motion is made pursuant to Rule 56, Federal Rules of Civil Procedure, and Local Rule 7.14 and is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities in Support Thereof, the Statement of Uncontroverted Facts and Conclusions of Law filed concurrently herewith, the pleadings and papers on file in this action, and upon such

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further evidence, oral or documentary as may be presented prior to or at the hearing on this motion.

DATED: December 4, 1992

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United States of America v. $93,685.61 in U.S. Currency, 730 F.2d 571 (9th Cir. 1984) cert. denied, 469 U.S. 831, 105 S.Ct. 119, 83 L.Ed.2d 61 (1984)	13, 14
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MEMORANDUM OF POINTS AND AUTHORITIES

I

SUMMARY

1. This in rem forfeiture action was brought against the defendant properties pursuant to Section 881 of Title 21 and Section 981 of Title 18 of the United States Code. Specifically, the government contends that the defendant properties are forfeitable because they represent items traceable to illegal narcotics activities in violation of 21 U.S.C. 881(a)(6) and because the defendants were involved in financial transactions in violation of 18 U.S.C. §§ 981 and 1956.

2. Claims have been filed in this action by Charles Arlt ("Arlt"), James Wren ("Wren") and Payback Mines. Arlt and his associates, including but not limited to, Wren, James Rocky Hill ("Hill"), Deanna Marie Pierce ("Pierce"), Robert Kuhnle ("Kuhnle"), Anita Gage ("Gage") and Daryl House ("House") were in the business of purchasing chemicals used to manufacture methamphetamine. See Exh. 1 at 2-4.

3. Arlt, Wren and Hill were convicted of over fifteen criminal violations, including conspiracy to manufacture methamphetamine, conspiracy to launder monetary instruments and money laundering. See Exh. 1 at 2-4.

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II

FACTUAL BACKGROUND

A ARLT'S ILLEGAL METHAMPHETAMINE ORGANIZATION

1. Arlt and his associates purchased cashier's checks, transferred funds and caused the wire-transfer of monies to chemical manufacturing companies for the purchase of chemicals used in the manufacture of methamphetamine.[1] Exh. 1 at ¶¶ 8, 12, 15, 18, 19, 21 (and Count 18), 23, 26 (and Count 10), 26, 27 (and Count 3), 31 (and Count 11), 31, 32 (and Count 4), 36, 37 (and Count 19), 39, 40 (and Count 12), 41 (and Count 5), 46, 47 (and Count 13), 48 (and Count 6), 51, 52 (and Count 14), 53 (and Count 7), 55 (and Count 20), 67 (and Count 15), 68 (and Count 8), 71, 72 (and Count 16), 73 (and Count 9), 78, 79 (and Count 17), 85 (and Count 21), 86, 87 (and Count 22).

2. Arlt and his associates made direct purchases of and ordered chemicals used in the manufacture of methamphetamine. See Exh. 1 at ¶¶ 1-6, 11, 14, 17, 22, 25, 29, 35, 38, 45, 50, 60, 62, 70, 77 (and Count 1).

3. Arlt and his associates stored the chemicals in storage facilities, distributed and arranged for and took delivery of the chemicals. See Exh. 1 at ¶¶ 9, 10, 13, 16, 20, 24, 28, 42, 43, 49, 54, 64, 69, 74, 75, 76, 81, 83, 91, 92 (and Count 1).

4. Arlt purchased and/or established several business entities which he used to transact business, including Highland

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[1] All references are to paragraphs ("Overt Acts") contained in the First Superseding Indictment ("Indictment") and the Count in the Indictment associated with the specific Overt Act. A certified copy of which is attached as Exhibit 1.

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Towing, Inc., AAA Minerals and claimant Payback Mines. Exh. 3 at 5, ¶ 1.

5. Arlt and his associates attempted to create the appearance that the chemicals they purchased were necessary for mining gold at several gold mines allegedly owned by Arlt in Nevada and California. No such mining operations in fact existed. Exh. 3 at 5, ¶ 2.

6. Arlt, Wren and Hill were convicted on each and every count alleged against them in the Indictment. See Exhs. 1, 2. On March 27, 1992, Arlt was convicted of nineteen counts of conspiracy to aid and abet the manufacture of methamphetamine, conspiracy to launder monetary instruments and of money laundering in violation of 18 U.S.C. § 1956(a)(1), and Wren was convicted of fifteen counts of the same criminal violations. Id. In addition, James Hill was convicted of conspiracy to manufacture methamphetamine and of laundering approximately $400,000, in violation of 18 U.S.C. § 1956(a)(1). Id. This act of laundering involved the $405,089.23 that is the first defendant listed in the caption in this case.

8. Arlt, Wren and Hill were convicted of laundering approximately $1,630,000 from July 1990 through March 1991.

B. TRANSACTIONS RELATED TO EACH DEFENDANT SUBJECT TO FORFEITURE

1. Defendant Properties Specifically Addressed in The Criminal Case

a. SECURITY PACIFIC BANK ACCOUNT #35-339-081, $405,089.23

9. Count 22 of the Indictment charged Hill with

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attempting to launder approximately $400,000. Hill was convicted of attempting to launder these funds. See Exhs. 1, 2; Exh. 3 at ¶¶ 115, 116.

b. $123,000 IN U.S. CURRENCY

10. On March 29, 1991 a state search warrant was executed at Mayhill Bail Bonds, 400 East Rialto, San Bernardino, CA. A cardboard box containing $123,000 in U.S. currency was seized pursuant to this search warrant. See Exh. 3 at ¶ 125.

11. Count 2 of the Indictment, in Paragraph 84, accused Wren of transporting $123,000 from Security Pacific to Mayhill Bail Bonds. See Exh. 1 at ¶ 84.

12. Wren was convicted on Count 2 of the Indictment. See Exhs. 1, 2.

2. Properties Not Specifically Addressed in Criminal Case

a. 138 Silver Bars

13. On March 29, 1991 a state search warrant was executed at Mayhill Bail Bonds, 400 East Rialto, San Bernardino, CA. See Exh. 3 at ¶ 125. In addition to the above-mentioned $123,000, 138 silver bars were seized during the search. Id. The total weight of these bars is approximately 13,479 ounces, having a total value of approximately $59,040. Id.

14. An elderly female who identified herself as Millie Mayhill responded to the officers' service of the search warrant. See Exh. 3 at ¶ 126. Millie Mayhill ("Mayhill") was read her Miranda warning and she consented to a taped discussion. Id. During this taped conversation with Mayhill, Mayhill advised that her brother is Jim Wren. Id. Mayhill

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explained that in January 1991 Wren brought silver bars and a box into her place of business, Mayhill Bail Bonds, and placed these items in the back room, which she described as the "safe room." Id.

15. Mayhill stated that she had known "FAT CHUCK", whose real name is Charles Arlt, for three years as Arlt would come to her business to bail a lot of his people out of jail. See Exh. 3 at ¶ 127.

b. **BANK OF AMERICA ACCOUNT NUMBERS 01963-04647; 01969-04649; 01964-04854**

16. Two accounts for Highland Towing were opened on February 20, 1991 showing the signature authority to be Arlt, Wren and Hill. See Exh. 3 at ¶ 117. Highland Towing was a business entity owned and controlled by Arlt. See Exh. 3 at ¶ 90.

17. On March 28, 1991, Wren opened a third account in the name of Payback Mines, which was a business entity owned by Arlt. See Exh. 3 at ¶¶ 117, 109. Only Jim and Regina Wren had signature authority on this account. Id. This account, no. 01964-04854, was supposed to receive the $405,089.23 that was the subject of Hill's money laundering conviction under Count 22. See Exh. 3 at ¶¶ 115, 117.

c. **BELL 47 HELICOPTER -- U.S. REGISTRATION NUMBER - N 59 H**

18. On Sunday, January 20, 1991, a man who introduced himself as Wren came to Edward Mauldin's place of business, named Sundance Helicopters, to purchase a helicopter. See Exh. 3 at ¶ 118. After taking Wren and an associate of Wren's for a

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test flight, Wren agreed to purchase the helicopter for $65,000. Id. Wren presented Mr. Mauldin with $65,000 in U.S. currency, which was contained in Wren's briefcase. Id. Most of the cash was in $100 bills with some in $50 and $20 denominations. Id.; Exh. 4.

19. Wren requested that the helicopter be registered in the name of Payback Mines. See Exh. 3 at ¶ 119. Wren also signed the bill of sale, signing as the vice president of Payback Mines. Id. Mr. Mauldin witnessed Wren's signature and mailed the completed bill of sale to the FAA. Id.

d. STORMY SEAS FOUR (SHRIMP BOAT) - OFFICIAL NUMBER 2159

21. On or around January 30, 1991, Wren purchased this boat at an auction for $51,700. Exh. 3 at 121.

22. Wren paid for the Stormy Seas Four with $51,700 in U.S. currency contained in a briefcase. Exh. 3 at ¶ 122. Most of the bills were in small denominations. Id. While counting the money one of Wren's associates, earlier identified as his son, pulled out a gun and laid it on the table for an unstated reason. Id. The boat was in dry dock for repairs in Biloxi, Mississippi immediately before being seized by federal agents of the IRS. Id.

e. PIPER CHEROKEE 6 AIRPLANE

23. On or about Sunday, December 30, 1990, Wren and Arlt came to Larry Oyers' business, named Western Cardinal, Inc., to look at a Piper Cherokee 6 airplane. See Exh. 3 at ¶ 123. On or about Monday, January 7, 1991, Oyers received a telephone call from Wren, who stated that Arlt wanted to buy the airplane

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on that day. Id. Wren and Oyers met at Redlands Aviation on January 7, 1991. Id. After an inspection of the airplane the two drove to Highland Towing Company. Id. After agreeing on a price of $32,000, Wren presented Oyers with a brown paper bag containing $32,000 in U.S. currency. Id. According to Oyers, most of the cash was in small denominations. Id.

24. Wren requested that the airplane be registered in the name of Payback Mines. See Exh. 3 at ¶ 124. Oyers witnessed Wren sign the bill of sale as vice president of Payback Mines. Id.

f. ELEVEN AUTOMOBILES AND ONE BOAT

25. On February 1, 1991, Wren purchased eleven cars and one boat from an auction, for a total of approximately $105,000. See Exh. 3 at ¶ 128; Exh. 5. Wren paid cash for the cars, pulling the money from a paper bag that appeared to have been buried. See Exh. 3 at ¶ 128; Exh. 5 at 1 (Arlt executed Form 8300 as authorized to sign on behalf of Payback Mines). Wren registered all of the cars to Payback Mines at 27110 East Third Street, the address of Highland Towing. See Exh. 3 at ¶ 128.

26. Arlt was with Wren when he made the above-described purchase. See Exh. 3 at ¶ 129.

27. Rick Martin, an employee of United Auto Auction, also recalled this above-described transaction with Wren and Arlt. See Exh. 3 at ¶ 130. Mr. Martin said that Arlt signed the Cash Transaction Report, indicating that he was the President of Pay Back Mines. Id.; See Exh. 5 at 1. Arlt had Wren sign the Department of Motor Vehicle documents for the vehicles. Id. Mr. Martin recalled that the cash used to purchase the vehicles

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was in twenties and hundreds, and was inside a very dirty brown paper bag. Id. Mr. Martin felt that Arlt was directing the transaction as Wren filled out some documents and a female that was with them filled out other documents. Id.

28. On or about May 2, 1991, each of the defendant properties was seized pursuant to seizure warrants. See Exh 6, a copy of each of the 20 seizure warrants.

III

ARGUMENT

A. PLAINTIFF MUST ESTABLISH PROBABLE CAUSE TO BE ENTITLED TO SUMMARY JUDGMENT

Summary judgment shall be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Thus, the government must first establish probable cause to believe that the defendant properties are forfeitable.

Unless claimants then are able to establish that the defendant properties were derived from a legitimate source, rather than from proceeds of claimants' methamphetamine activities, a summary judgment of forfeiture is appropriate.

> [T]he summary judgment procedures under Rule 56, Fed.R.Civ.P., must necessarily be construed in the light of the statutory law of forfeitures, and particularly the procedural requirements set forth therein. . . .

United States v. $5,644,540 U.S. Currency, 799 F.2d 1357, 1361

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(9th Cir. 1986) (citing United States v. One 56-Foot Motor Yacht Named Tahuna, 702 F.2d 1276, 1281 (9th Cir. 1983)).

1. Defendant Properties Are Forfeitable On Narcotics "Proceeds Theory"

Title 21 section 881(a)(6) of the United States Code provides for forfeiture to the United States of the following:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> * * *
>
> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

a. Plaintiff's probable cause burden

The burden of proof in civil forfeiture actions is set forth in 19 U.S.C. § 1615. United States of America v. $5,644,540 in U. S. Currency, 799 F.2d 1357, 1362 (9th Cir. 1986). Section 1615 provides that to succeed in an action for

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forfeiture it is the plaintiff who has the initial burden. To satisfy this burden plaintiff must establish probable cause. In a civil forfeiture action under 21 U.S.C. § 881(a) the "government initially must demonstrate probable cause to believe that the property was involved in an illegal drug-related transaction." Id. at 1362; United States of America v. Dickerson, 873 F.2d 1181, 1184 (9th Cir. 1988).

Probable cause is a question of law to be decided by the court. United States of America v. $93,685.61 in U.S. Currency, 730 F.2d 571, 572 (9th Cir. 1984); United States of America v. Padilla, 888 F.2d 642, 643 (9th Cir. 1989).

It is well established that the standard for showing probable cause in a civil forfeiture case is no greater than for a search warrant. United States of America v. One 56-Foot Yacht Named the Tahuna, 702 F.2d 1276, 1281 (9th Cir. 1984). Plaintiff must show that there is more than a mere suspicion that the real property is connected to illegal drug transactions. "Probable cause is shown if the government produces 'less than prima facie proof but more than mere suspicion.'" United States of America v. $83,310.78 in U.S. Currency, 851 F.2d 1231, 1235 (9th Cir. 1988) (citation omitted).

In $83,310.78 in U.S. Currency, the court upheld a judgment of forfeiture after concluding that the "government had shown that there was more than a mere suspicion that the seized currency was connected to an illegal drug transaction." Id. at 1235 (emphasis added).

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b. Reliance upon circumstantial evidence and hearsay

To make its probable cause showing, plaintiff must offer evidence that is "adequate and sufficiently reliable to warrant the belief by a reasonable person" that the defendant properties were connected to drug transactions. United States of America v. One 56-Foot Yacht Named the Tahuna, 702 F.2d 1276, 1282 (9th Cir. 1983).

Plaintiff may make its probable cause showing by relying upon circumstantial evidence. United States of America v. $93,685.61 in U.S. Currency, 730 F.2d 571, 572 (9th Cir. 1984) cert. denied, 469 U.S. 831, 105 S.Ct. 119, 83 L.Ed.2d 61 (1984). Furthermore, such evidence need not be admissible at trial if the court deems it adequate and sufficiently reliable. United States of America v. 1982 Yukon Delta Houseboat, 774 F.2d 1432, 1434 (9th Cir. 1985).[2] "The question of probable cause depends not upon the admissibility of the evidence upon which the government relies but only upon the legal sufficiency and reliability of the evidence." Tahuna, 702 F.2d at 1283.

c. Probable cause is judged by the aggregate of facts

In deciding whether the United States has established probable cause, the Court must look to the aggregate of facts. United States v. $83,310.78 in U.S. Currency, 851 F.2d 1231 (9th Cir. 1988); United States v. $5,644,540 U.S. Currency, 799 F.2d 1362.

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[2] Accordingly, reliance on the Affidavit of Special Agent Mullins, the Indictment and Criminal Minutes, and other documentary evidence is appropriate. Id. at 1282-83.

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> Probable cause is shown if 'the aggregate of facts gives rise to more than mere suspicion that the property was exchanged for or intended to be exchanged for drugs.'

$83,310.78, 851 F.2d at 1235 (citing $5,644,540 U.S. Currency.)

In United States v. $29,959 U.S. Currency, 931 F.2d 549, 553 (9th Cir. 1991), the court held that possession of large amounts of currency is strong evidence of drug trafficking.

> Cash amounting to $29,959 is an 'extremely large amount' to be kept in the home. . . This alone is 'strong evidence that the money was furnished or intended to be furnished in return for drugs.

Similarly, the use of large amounts of cash to purchase properties is evidence of drug trafficking and that drug proceeds were used to purchase such properties. See United States v. Thomas, 913 F.2d 1111, 1115 (4th Cir. 1990).

The convictions of Arlt, Wren and Hill of conspiracy to aid and abet the manufacture of methamphetamine, conspiracy to launder monetary instruments and money laundering are sufficient for probable cause by themselves. Nevertheless, with each of the defendant properties, other than the $405,089.23 and the silver bars, there is additional evidence that clearly establishes probable cause.

First, with regard to the $405,089.23, James Hill has already been convicted of attempting to launder this money. See Exhs. 1, 2. This conviction, under 18 U.S.C. § 1956(a)(1), required that the defendant money was obtained from an unlawful

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activity, that being methamphetamine trafficking.

Second, Wren was convicted on Count 2 of the Indictment, which incorporates Paragraph 84, relating to the $123,000 that Wren transported to Mayhill Bail Bonds. Furthermore, the extremely large amount of currency itself bolsters the existence of probable cause.

Third, the $8,929.93 seized from three bank accounts, is also forfeitable. Two of the accounts were in the name of Highland Towing. Only Arlt, Wren and Hill had signature authority on these accounts, indicating that the money was a proceed of their methamphetamine trafficking. Furthermore, Highland Towing was a company owned by Arlt. The third account was opened in the name of Payback Mines, another company owned by Arlt. The fact that this account was also in the name of one of Arlt's companies, also supports the finding of probable cause. See Exh. 3 at ¶ 117.

Fourth, probable cause for the Bell 47 Helicopter is further supported by the fact that it was purchased with cash for $65,000. Furthermore, the aircraft was placed in the name of Arlt's business, Payback Mines. See Exh. 3 at ¶ 119; See Exh. 5 at 1 (bottom of document indicates that Arlt signed on behalf of Payback Mines.) See Exh. at ¶¶ 118-119.

Fifth, forfeiture of the Stormy Seas Four shrimp boat is further supported by the fact that it was purchased with $51,700 in currency. Like the helicopter, this fishing vessel was placed in the name of Arlt's business, Payback Mines. See Exh. 3 at ¶ 122.

Sixth, probable cause for the Piper 6 Cherokee Airplane is

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bolstered by the purchase of the aircraft with $32,000 in currency. Like the above two properties, the airplane also was placed in the name of Arlt's business, Payback Mines. See Exh. at ¶¶ 123-124.

Seventh, the eleven automobiles and one boat were purchased with $105,000 in cash at an auction. Like the above helicopter, fishing vessel and airplane, the eleven vehicles and one boat also were placed in the name of Arlt's business, Payback Mines. See Exh. at ¶¶ 128-130.

For the above stated reasons, plaintiff submits that it has established probable cause to believe that each of the defendant properties is forfeitable as a proceed of claimants' illegal narcotics activities, under 21 U.S.C. § 881(a)(6).

2. Defendant properties also are forfeitable on money laundering theory

Plaintiff also alleges that the defendant properties are forfeitable under 18 U.S.C. § 981(a)(1). Pursuant to section 981(a)(1)(A), if the defendant properties were "involved in" or are traceable to properties involved in violations of 18 U.S.C. § 1956(a)(1)(B), such properties are forfeitable to the government.

The defendant properties were "involved in" or traceable to violations of 18 U.S.C. § 1956(a)(1)(B) if: the defendant properties were derived from a "specified unlawful activity", namely, the manufacture and sale of methamphetamine; and, the defendants were involved in financial transactions designed to conceal the nature, location, source, ownership, or control of the funds.

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a. The Statutory Framework

Title 18 section 981(a)(1)(A) of the United States Code provides for forfeiture to the United States of the following:

> Except as provided in paragraph (2), the following property is subject to forfeiture to the United States:
>
> (A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5313(a) or 5324 of title 31, or of section 1956 or 1957 of this title, or any property traceable to such property.

Id. (emphasis added).

Title 18, section 1956(a)(1) defines money laundering as follows:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--
>
> (B) knowing that the transaction is designed in whole or in part--
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity . . .

The term "specified unlawful activity" includes the

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violation of the federal narcotics laws. [3]

As stated above, claimants were convicted of numerous counts of conspiracy to manufacture methamphetamine, conspiracy to launder monetary instruments and money laundering.

b. Defendants Were "Involved In" or Derived from Violations of Section 1956 and Therefore Are Forfeitable

To be entitled to summary judgment, the government must establish probable cause to believe that the defendant properties were "involved in" or are traceable to money laundering violations; that each was derived from a "specified unlawful activity", methamphetamine activities for instance, and that each of the defendant properties was involved in financial transactions designed to conceal the location, source, ownership and control of that defendant property. United States v. All Monies, 754 F. Supp. 1467, 1471 (D. Haw. 1991); United States v. Padilla, 888 F.2d 642, 643-44 (9th Cir. 1989).

As stated above, to make its probable cause showing, plaintiff must offer evidence that is "adequate and sufficiently reliable to warrant the belief by a reasonable person" that the defendant properties represent the proceeds of claimant's methamphetamine activities. See United States of America v. One 56-Foot Yacht Named the Tahuna, 702 F.2d 1276, 1282 (9th Cir. 1983); United States v. All Monies, 754 F. Supp. 1467, 1471 (D.

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[3] The term "specified unlawful activity" is defined in section 1956(c)(7)(A), and includes "any act or activity constituting an offense listed in § 1961(1) of this title . . ." Section 1961(1)(D) includes "any offense involving . . . the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States."

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Haw. 1991). The standard for establishing probable cause is more than a mere suspicion but less than a preponderance of the evidence. All Monies, 754 F. Supp. at 1471; United States v. Padilla, 888 F.2d 642, 643-44 (9th Cir. 1989).

The defendant properties were involved in financial transactions designed to conceal the location, source or the ownership of the defendant properties or were traceable to such transactions.

First, with regard to the $405,089.23, James Hill has already been convicted of attempting to launder this money. See Exhs. 1, 2. Therefore, it is automatically forfeitable.

Second, Wren was convicted of conspiracy to commit money laundering in Count 2 of the indictment, which incorporates Paragraph 84. Paragraph 84 alleged that Wren transported $123,000 from Security Pacific Bank to Mayhill Bail Bonds.

Third, the $8,929.93 seized from three bank accounts, is also forfeitable. Two of the accounts were in the name of Highland Towing. Only Arlt, Wren and Hill had signature authority on this account, which supports the conclusion that the money was "involved in" or traceable to their methamphetamine activities. Furthermore, Highland Towing was a company owned by Arlt. The third account was opened in the name of Payback Mines, another company owned by Arlt. This fact also supports the conclusion that the funds were traceable to methamphetamine activities. Therefore, it also supports the finding of probable cause. See Exh. 3 at ¶ 117.

Fourth, the Bell 47 Helicopter was involved in or is traceable to a $65,000 cash transaction, designed to conceal the

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source, ownership, and control of the property. See Exh. 3 at ¶ 118.

Fifth, the Stormy Seas Shrimp boat was involved in or is traceable to a $51,700 cash transaction, designed to conceal the source, ownership, and control of the property. See Exh. 3 at ¶ 122.

Sixth, the Piper 6 Cherokee Airplane was involved in or traceable to a $32,000 cash transaction, designed to conceal the source, ownership, and control of the property. See Exh. 3 at ¶ 123.

Seventh, the eleven automobiles and one boat were involved in or are traceable to a $105,000 cash transaction designed to conceal the source, ownership, and control of the properties. See Exh. 3 at ¶ 129.

a. Three bank accounts were used to facilitate money laundering of narcotics proceeds, therefore funds in accounts are forfeitable

As stated above, the government seized three bank accounts containing funds involved in financial transactions. Although there are very few reported opinions interpreting Title 18 section 981(a)(1), the government submits that property used to "facilitate" illegal money laundering, including a bank account, is forfeitable to the government.

This interpretation of section 981(a)(1)(A) is made clear by the legislative history of the statute.

> [T]he term "property involved in" is intended to include the money or other property being laundered (the corpus), any

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> commissions or fees paid to the launderer, and any property used to facilitate the laundering offense.

134 Cong. Rec. S17365 (daily ed. Nov. 10, 1988) (emphasis added). In United States v. All Monies, 754 F. Supp. 1467 (D. Haw. 1991), the court held that forfeiture of an entire bank account used to launder narcotics proceeds was appropriate under 18 U.S.C. § 981(a)(1)(A).

> This Court finds that 18 U.S.C. § 981(a)(1)(A) applies to all property that facilitates violations of §§ 1956 and 1957. Even though § 981 does not expressly include the words "facilitate" or "facilitating," the statute covers property "involved in" illegal money laundering transactions. . . The legislative history makes it clear that "property involved in" includes property used to facilitate money laundering offenses.

Id. at 1473.

In United States v. Certain Funds on Deposit, 769 F. Supp. 80 (E.D.N.Y. 1991), the court adopted the reasoning of the All Monies case. Interpreting 18 U.S.C. § 981(a)(1)(A), the court held that:

> This section has been construed by the district courts as authorizing the forfeiture of an entire bank account or business which was used to "facilitate" the

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> laundering of money in violation of 18 U.S.C. § 981(a)(1)(A).

Id. at 84 (citing All Monies, supra; United States v. 4643 W. Kennedy Blvd., No. 90-46-Civ-T-13, slip op., 1990 WLJ05391 [M.D.Fla. Feb. 12, 1990] (emphasis added).[4]

Each of these three bank accounts was controlled by Arlt. This supports the conclusion that the accounts were used to facilitate the numerous money laundering acts committed by Arlt and his associates. In effect, the accounts were used to "facilitate" the laundering of claimants' methamphetamine proceeds. Thus, the accounts and the money in such accounts is forfeitable.

Even if claimants could establish that they mixed some legitimately obtained money into the accounts containing narcotics proceeds, all of the money in such accounts is forfeitable. In finding that an entire bank account could be forfeited, even if the account contained legitimate deposits, the court in Certain Funds on Deposit reasoned:

> As the government contends, limiting the forfeiture of funds under these circumstances to the proceeds of the initial fraudulent activity would effectively undermine the purpose of the forfeiture statute. Criminal activity such as money

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[4] In United States v. $488,342.85 U.S. Currency, 969 F.2d 475, 477 (7th Cir. 1992), the court rejected the theory that a bank account may be deemed to "facilitate" money laundering, but upheld summary judgment on the grounds that the criminal proceeds exceeded the amount seized.

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> laundering largely depends upon the use of legitimate monies to advance or facilitate the scheme. It is precisely the commingling of tainted funds with legitimate money that facilitates the laundering and enables it to continue.

Id. at 84-85.

Accordingly, the money seized from these accounts should be forfeited if the bank accounts from which the funds were seized contained narcotics proceeds. Unless claimants can establish with competent evidence that such accounts did not contain funds traceable to narcotics proceeds, the defendant funds must be forfeited to plaintiff.

Plaintiff submits that it has established probable cause to believe that each of the defendant properties, except the silver bars, was involved in a violation of section 1956(a). Therefore, each of the defendant properties, except for the silver bars, is forfeitable under 18 U.S.C. § 981.

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CONCLUSION

For the foregoing reasons plaintiff asserts that the uncontroverted facts more than establish probable cause to believe that each of the defendant properties is forfeitable as narcotics proceeds under 21 U.S.C. § 881(a)(6) and as properties "involved in" money laundering under 18 U.S.C. § 981(a).

Dated: December 4, 1992

TERREE A. BOWERS
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
MANUEL A. MEDRANO
Assistant United States Attorney
Chief, Asset Forfeiture Section

/s/ Mark A. Feldman

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Assistant United States Attorney

Attorneys for plaintiff

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APPENDIX B

CHARLES WESLEY ARLT
26889-048
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3901 Klein Blvd.
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Claimant in pro se

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF CALIFORNIA, Plaintiff, vs $405,089.23 in Currency, et al., Defendants, CHARLES ARLT, JAMES WREN, and PAYBACK MINES., Claimants.	Case No. CV 91-3264 AWT CLAIMANTS' OPPOSITION TO PLAINTIFF'S MEMORANDUM OF CONTENTIONS OF FACTS AND LAW, and MOTION TO STRIKE

Claimants hereby oppose the plaintiff's memorandum of contentions of fact and law, and move to strike the document as it is merely a repetition of the plaintiff's conclusory and uncorroborated statement of fact and conclusions of law for his motion for summary judgment. The plaintiff's memorandum is identical to its previous motions and, at best is surplusage that offers nothing new or corroborative to its unsupported claims for summary judgment. Therefore, the plaintiff's memorandum should be striken.

However, if this Court does not strike the plaintiff's memorandum, the claimants hereby deny all plaintiff accusations that the

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defendant properties were the proceeds of any illegal activity, or that they were used, connected to, or involved in, any money laundering activities. Claimants incorporate by reference all of the exhibits that were attached to claimant's cross-motion for summary judgment. The exhibits are referenced herein.

CLAIMANTS' MEMORANDUM OF UNCONTROVERTED FACTS

1. This in rem forfeiture action was brought against the defendant properties pursuant to a claim by the plaintiff under Title 21 U.S.C. § 881 (a)(6) and Title 18 U.S.C. § 981. Specifically, the plaintiff has limited his theory for forfeiture to two theories; first, that the defendant properties are forfeitable because the government claims they represent items traceable to illegal narcotics activities in violation of 21 U.S.C. § 881 (a)(6); and second, because the government claims the defendants were involved in "Financial Transactions in violation of U.S.C. §§ 981 and 1956."

2. Claims have been filed in this action by claimants Charles Arlt ("Arlt") and Jim Wren ("Wren") and Payback Mines. Declarations by claimants Arlt and Wren are submitted herein as evidence, and attached hereto in support of this document.

3. In every single transaction by claimants', or their employees, in which cash, cashier's checks, or money transfers occurred, there was a properly completed and filed Currency Transaction Report, or bank remittance or bank acceptance form, or IRS 1099 form, submitted to the proper authority. The plaintiff knows this fact to be true in every financial transaction, including the wire transfer of funds for the purchase of chemicals for claimants gold recovery solution business. There was never any concealment of names of claimant or the source of the funds, or the use of the chemicals that were purchased.

4. Because of the undeniable fact that a currency transaction

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report was properly and timely filed in all transactions by claiments in relation to the defendent properties, there is no violation of 18 U.S.C. § 1956, and such behavior is not present here.

5. The claimants have unquestionably never attempted "to conceal or disguise the nature, location, source, ownership or control of..."defendents properties, nor the source and use of those properties. The plaintiff has possession of all sales receipts, purchase orders purchase receipts, vehicle and equipment registrations, and the related banking form or IRS 1099 forms or currency transaction form for every defendent property where required by law and there is no trace of concealment or disguise of ownership. Claiments' have at all times left a wide paper trail like any other legitimate business person(s) would do.

6. Because there was no attempt to "conceal or disguise the nature, location, source, ownership or control of..."the defendents properties, and because prior to arrest the claiments had willingly invited the police to inspect their businesses, there is no violation of 18 U.S.C. § 1956 which plaintiff uses to claim forfeiture under §981. Concealment and disguise of the nature, location, source, ownership or control of the defendents properties is an essential and required element under § 1956, and such behavior is conspicuously absent here.

7. No drugs or drug paraphernalia was present at any of the claimants homes or businesses, and none of the defendant properties were found in connection with the use or presence of drugs or drug paraphernalia. In fact there were no drugs found in the presence of any claimant, nor was there any witness ever to claim that the defendant properties were the proceeds from any drug business. The only "witnesses" that the plaintiff can ever produce is a government agent with suspicions and conclusions. There is not even circumstantial evidence.

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8. Claimant Arlt has been in the gold mining business for over twenty (20) years which is verifiable and undisputed by plaintiff. Claimant Arlt has developed a gold recovery chemical solution (similar to other commercially sold gold recovery solutions) that uses an electrolysis method of extracting micron gold from high grade ore. See Declarations as evidence. Claimant sought approval for obtaining the chemicals, from the Drug Enforcement Administration, on two occassions prior to and during his purchasing of chemicals. See Exhibits A through F regarding claimants' complianne with regulations. See Exhibit G of other refining company selling strikingly similar gold recovery chemical solution using about the same ingredients.

9. One of the chemicals used in the gold recovery solution was a bio-degradable solution called hydriodic acid, which is also a chemical used in the manufacture of methamphetamine. However, claimant ordered his purchases of hydriodic acid to be mixed at the factory with hydrocloric acid, which would make the delivered product an undesirable chemical for drug manufacturing. Chemical company records verify the claimants compliance with the regulations, and that the chemical strength and and mixture of hydriodic acid was of such a level as to be undesireable for illegal drug business.

10. Thus, the plaintiff's claims that the chemicals ordered by claimant were for drug manufacturing is false, and such claim was uncorroborated by a single instance of such activity. The plaintiff has not produced one scintilla of evidence of drug manufacturing occurring from the claimant's chemical purchases. The plaintiff has only represented mere suspicion.

11. Claimants can account for the purchase and sales of all of the chemicals, by proper record keeping as required by law, which the plaintiff erroneously claims were used for illegal activity. All chemicals were purchased in compliance with the law, and sold to legitimate, verifiable mining operations using the electrolysis method of recovering micron gold.

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See exhibits A through N inclusive.

12. There is no mysterious or concealed sources of illegal money. All sources of income are documented and verifiable, as the proceeds of the claimants' gold mining operations and sales of the gold recovery solutions. See exhibits G through N. Additionally, the plaintiff has possesssion of other receipts to verify sales.

13. Claimants and the defendants properties all have a paper trail to legitimate sources of income. There is no unexplained sources of income, nor unexplained bank deposits, nor unexplained purchases.

14. No assets were ever concealed at any time.

15. All defendant properties have a verifiable legitimate source.

16. Currency Transaction Reports were always filed by claimants when required by law.

17. There is no corroborated evidence, nor even a scintilla of evidence of drug activity connected to the defendant properties.

18. Claimants' accountant was notified about the purchases of all vehicles and equipment for the purpose of compliance with tax laws.

19. When claimants purchased the defendant airplane, helicopter, and vehicles at auction, the claimants notified the seller to file all the proper IRS forms for a cash transaction because the claimants would be listing the purchases in their tax filings.

20. There is no concealment of the fact of who controlled or owned any of the defendant properties at any time whatsoever.

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CLAIMANTS' STATEMENT OF CONCLUSIONS OF LAW

IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGEMENT

A. PALINTIFF HAS NOT ESTABLISHED PROBABLE CAUSE WHEN CLAIM IS BASED WHOLLY UPON MERE SUSPICION, AND WITHOUT ANY CORROBORATION

Summary judgement is appropriate only where "there is no genuine issue as to material fact. . .the moving party is entitled to a judgement as a matter of law." Fed. R. Civ. P. 56(c). On a motion for summary judgement, "the district judges function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. Sorosky v Burroughs Corp., 826 F2d 794, 798 (9th Cir 1987).

Summary judgement is precluded if there is a dispute "over facts that might effect the outcome of the suit under the governing law." Anderson v Liberty Lobby, Inc. 477 U.S. 242, 248 (1986).

In the instant case, the claimants' evidence, sworn declarations, and attachments thereto, clearly show that there are disputed facts in plaintiff's "material facts". A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id. The plaintiff has no facts to support a finding of probable cause because it relies on its own employee's speclation and creative writing of an affidavit based on mere suspicions. The claimant's declarations and oppositions answers are sufficient to preclude summary judgement for the plaintiff, and to grant claiments' cross-motion, for lack of probable cause.

1. THE DEFENDENT PROPERTIES ARE NOT FORFEITABLE AS "NARCOTIC PROCEEDS THEORY" UNDER TITLE 21 U.S.C.§ 881(A)(6).

This circuit's determination of the existence of probable cause for forfeiture, in United States v $5,644,540.00 In U.S. Currency, 799 F2d 1357, 1363, (9th Cir 1986), is by application of the "aggregate of facts" test.

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Probable cause cannot be shown by plaintiff unless the "aggregate of facts" gives rise to more than mere suspicion that the property was exchanged for or intented to be exchanged for drugs; the presence or absence of any single fact is not dispositive. Id. Circumstantial evidence of drug transactions may support the establishment of probable cause. United States v $93,685.61, 730 F2d 571 (9th Cir) (per curiam), cert. denied. 469 U.S. 831, 105 S. ct. 119, 83 L. Ed 2d 61 (1984). The mere fact that a large amount of money is present in the case is not dispositive that the money was furnished or intended to be furnished in return for drugs. Id. However, the test requires more than the mere existence of a large amount of cash to establish a connection between that cash and illegal drug transactions; the money must be "in combination with other persuasive circumstantial evidence" Id. Particularly persuasive is the presence of drugs or drug paraphernalia. Id. see, United States v Padilla, 888 F2d 642, 643-644 (9th Cir 1989).

In this instant case, there is a conspicuous absence of any drugs or drug paraphernalia in all the searches of claimant's homes and businesses. Additionally, the money was in a bank, not sitting in a drug dealer's safe. Currency Transaction Reports had been filed. None of the properties were alleged to carry drugs. There is no question that claimant Arlt was successful at his gold mining operations and his sales of gold recovery solution for electrolysis operations. Some of the property, the $ 123,000.00 and the 138 silver bars, were in the security safe of Mayhill Bail Bonds, and no evidence of drug dealing activity was ever connected to this money or the long established Mayhill Bail Bond business.

In the instant case there is no evasive conduct as occurred in U.S. v $83,310.78 851 F2d 1231 (9th Cir 1988). In the instant case, the claimants came to the authorities to first report the attempted extortion of claimants by the San Bernardino Drug Task Force. Then, the claimants and their lawyer,

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John Barnett, volunteered to turn themselves in if there was any need. At all times, the claimants have been forthcoming and not evasive. At all times the claimants filed reports and left paper trails in compliance with law. At no time did any person testify that all defendant property was proceeds from any illegal activity, or used to facilitate illegal activity. See declarations of the claimants.

2) ALTHOUGH PLAINTIFF HAS NOT YET SHOWN MORE THAN MERE SUSPICION, CLAIMANTS HAVE PROVED BY CLEAR AND CONVINCING EVIDENCE THAT THE DEFENDANT PROPERTIES ARE NOT THE PROCEEDS FROM ANY DRUG ACTIVITIES.

Plaintiff's only "evidence" is another government employee's affidavit of suspicions and opinions. The self-serving declaration of Special Agent Phillip Mullins ("SA Mullins") is nothing more than creative writing about suspicions and opinions woven together to support predetermined conclusions. There is no substance, only suspicion.

Plaintiff AUSA also included the indictment, an accusation, as evidence for this forfeiture. That the indictment is not evidence is common knowledge, and it should not be considered as "evidence" here.

Plaintiff uses the unjust conviction as if it is evidence that the defendant properties therefore, ipso facto, are guilty. Such reasoning is faulty, and probable cause does not lie here. Claimants did not plead guilty because they are not guilty. The conviction was obtained illegally and by the sheer financial superiority, and power to incarcerate, of the plaintiff, and not based on justice. The plaintiff produced 125 "witnesses" at the criminal trial, but not one could connect the defendant properties to illegal drug activities. The jury was so confused that it told the trial judge they were confused. Therefore, the judgement and commitment papers used by plaintiff as exhibits do not create probable cause.

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B. DEFENDANT PROPERTIES HAVE NOT BEEN SHOWN TO BE CONNECTED TO ANY MONEY LAUNDERING ACTIVITIES AND THUS ARE NOT FORFEITABLE

The plaintiff has also alleged that the defendant properties are forfeitable under Title 18 U.S.C. § 981(a)(1). However, plaintiff has not shown more than mere suspicion for his uncorroborated claims to confiscate the defendant properties.

To obtain civil forfeiture of property under the money laundering theory of Title 18 U.S.C. § 981 or the "narcotic proceeds" theory under Title 21 U.S.C. § 881(a)(6), the government need only show that probable cause exists to believe that the property was subject to forfeiture. There is clearly not enough evidence to show any connection between the defendant properties and illegal activities subject to §§ 981 and 881. The requirement is the same for either statute.

As stated above, the "aggragate of facts" does not show probable cause. At best, there is barely mere suspicion which the plaintiff cannot corroborate.

Assuming, arguendo, that the plaintiff had shown probable cause that the defendant properties qualified for forfeiture, the burden would then have shifted to the party defending the property to show by a preponderance of evidence that forfeiture is not appropriate. Claimants' declarations and the attached exhibits of evidence, A through AB inclusive, go far beyond the preponderance of evidence standard and become clear and convincing evidence that summary judgement should be granted for the claimants on cross-motion for summary judgement.

The plaintiff has not shown that the "essential elements" of Title 18 U.S.C. § 1956(a)(1) as he claims in order to activate forfeiture under Title 18 U.S.C. § 981. (See Plaintiff's Motion for Summary Judgement, page 18 ¶ a. The Statutory Framework.) Claimant, and defendant properties, did

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not behave in any manner consistent with the requirements of § 1956. For instance, the claimants filed currency transaction reports for all the transactions where required. The claimants never concealed nor disguised the ownership of the defendant properties. Every cash deposit, sale, or purchase of equipment or vehicles was completely visable, aboveboard, and with a complete paper trail. It is conspicuously clear that the claimants acted in a completely opposite manner from the essential elements of § 1956. All law enforcement attempts to forfeit properties claim that either the properties were purchased in a manner to disguise or conceal ownership, or that money was not reported on the proper IRS 1099's or Currency Transaction Reports. Here, in the instant case, the claimants have openly filed every required form for Currency Transactions, or for equipment or vehicle purchases, or for cash sales, and for the registration and ownership of every vehicle purchased. (See declarations of claimants, and document exhibits A through AB.)

In summation, every defendant property listed herein has a full and proper legal paper trail, in complete compliance with what the law required. There is not a single instance that the plaintiff can provide where § 1956 elements are met in order to activate forfeiture under § 981. A review of exhibits A through O shows the legitimate source of money, and purchase and resale of chemicals for gold recovery mining. The plaintiff has every Currency Transaction Report and 1099 form filed by claimants, and has not yet complied with another court's order to deliver those evidence receipts to the claimants.

C. THE PLAINTIFF HAS NOT PRESENTED ANY EVIDENCE OF ILLEGAL ACTIVITY CONNECTED WITH THE DEFENDANT PROPERTIES

The plaintiff claims that his use of a field agent's affidavit of suspicions, couched in creative and accusatory writing, without any specific

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illegal transaction identified, nor even a second hand report of a specific illegal transaction, is sufficient "evidence" to establish probable cause. See plaintiff's Motion for Summary Judgement, page 14 ¶b, footnote 2.

Although declarations are considered as evidence, it is usual that the declaration is by a witness to the illegal act, not by someone who saw nothing and heard of no illegal act. Here, the declaration of Special Agent Mullins is no more than creative, pro-government suspicion. There is no witness declaration. SA Mullins cannot even report that any other heresay witness told him that the defendant properties were used in, or involved in, or proceeds from, or used to facilitate, any illegal act whatsoever.

SA Mullins' declaration merely puts a twist on his interviews with people who sold various items to the claimants. No witness claimed anything illegal happened, nor that claimants failed to file a currency transaction report, nor that claimants attempted to conceal or disguise any transaction in any way.

Sa Mullins declaration is not even heresay, and it is not evidence. It is mere suspicion without a crime. The plaintiff relies heavily on United States v All Monies ($477,048.62) in account 90-2617-3, 754 F. Supp. 1467 (D. Hawaii 1991). There the government relied on several affidavits of agents who investigated the case. There was significant heresay used. Heresay evidence is not admissable to establish or rebut a claimant's innocent owner defense. Id. In All Monies, the claimant admitted that the government had probable cause to show money laundering activity, and there were direct money transfers to the accounts of the Medellin Cartel.

None of the All Monies facts are relevant in the instant case. Claimants have always maintained their innocense, and there is no illegal transaction with any of the defendant properties. The properties cannot be

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traced to any illegal activity as in All Monies. "To be forfeitable, there must be a substantial connection between the property and the illegal activity." Id at 1473. "There must be more than an incidental or fortuitous connection between the property and the illegal activity..." Id.

In the instant forfeiture, there is no portion of the defendant property used to facilitate any illegal act, and plaintiff cannot point to any specific illegal act. Claimants vigorously object to the plaintiff's conclusions which have failed to meet the "aggragate of facts" test required in this case. All of the plaintiff's points and authorities had one thing in common that is lacking in the instant case, and that is an illegal activity that someone witnessed which was connected to the properties.

D. THE THREE BANK ACCOUNTS WERE NEVER SHOWN, BY MORE THAN MERE SUSPICION, TO HAVE FACILITATED MONEY LAUNDERING, AND ARE THEREFORE NOT FORFEITABLE

The plaintiff relied heavily on vague and ambiguous claims of narcotic proceeds from unknown sources. This mistaken claim could be made of any account in any bank if the government was to ignore th proper paper trail.

The plaintiff relied on All Monies, supra, to make the uncorroborated claim that the bank accounts are forfeitable under a "facilitating" theory. The reasoning in All Monies was based on the fact that direct links were established to illegal activity, and the claimant conceded that the account was partially used to transfer illegal dollars. That is not the case here. In the instant case, the plaintiff cannot trace any deposit in the three bank accounts to any illegal transaction, and no claimant or witness has ever stated that either of the three bank accounts were ever used for any illegal deposits or for any illegal activity. The facts in this case require summary judgement for the claimants.

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In order for the plaintiff to prevail on a claim to forfeit the entire bank accounts as it claims, there would have to be some showing that the "account(s)" had commited some illegal act since it is a mere repository of funds. The plaintiff has not set forth a theory that some of the money in the bank accounts was legal and used to conceal the "illegal" proceeds. Indeed, the plaintiff has not identified which proceeds, or amounts, it believes are illegal and which are legal. The claimants evidence attached here does establish the legal source of the funds in the bank accounts.

Thus, the government cannot support "facilitation" theory of forfeiture under 18 U.S.C. § 981. See, United States v All Monies ($477048.62) In Account No 90-3617-3, 754 F. Supp.1467, 1472 (D. Hawaii 1991)

E. DEFENDANT CURRENCY AND 138 SILVER BARS HAVE A LEGITIMATE SOURCE AND ARE THEREFORE NOT FORFEITABLE UNDER PLAINTIFF'S THEORIES

Plaintiff cites several cases that have held that under certain conditions the possession of large amounts of currency is strong evidence of drug trafficking. However, the distinguishing point between the plaintiff's cited authorities and the defendant properties herein is the lack of a nexus or direct link to drug activity, or concealment, or unusual behavior, or there is an amount of money far beyond the ways and means of the claimant. There is always some fact of illegal drug trade or behavior that normal people would not customarily do in the handling of their affairs. See plaintiff's citations: United States v $5,644 in U.S . Currency 799 F2d 1356, 1362 (9th Cir 1986); United States v $29,959 U.S. Currency, 931 F2d 549, 553 (9th Cir 1991); United States v Thomas, 913 F2d 1111, 1115 (4th Cir 1990). Without exception, the plaintiff cites cases that uphold the forfeiture of money only when there is other direct evidence of drug offenses, unusual concealment, or a defendant has claimed money that is far beyond his declared income and believable and verifiable means and living standards.

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For the very reasoning in plaintiff's citations, the large amount of money in this case is not subject to forfeiture. There is not a single drug transaction involving the claimants or the defendants, but for the conclusory and uncorroborated claims of plaintiff. There are no witnesses telling the plaintiff that the claimants admitted using the defendant properties or the sums of money for illegal activities, or that the defendants were proceeds from illegal activity. There are only suspicions and conclusions. The defendant money in the bank accounts, and other defendants, was not concealed or disguised in any false names. Claimants were completely aboveboard in all their banking because there was nothing illegal going on. Claimants did have valid and verifiable sources of income from their businesses. The defendant properties and money can be reasonably seen to have been generated by the claimants businesses.

Additionally, claimants here, as opposed to the claimants in the plaintiff's citations, have left a complete paper trail of the required Currency Transaction Reports and IRS 1099 forms for every transaction requiring such a form. The business operations of the claimants was the source of every cent used by claimants in their banking and purchase of additional equipment and chemicals for resale.

Plaintiff repeatedly concludes that the defendant properties and money were proceeds from methamphetamine business, and that the bank accounts were used to "facilitate" numerous money laundering acts. Nowhere does plaintiff directly connect one penny to any methamphetamine. Nowhere, except by suspicion and conclusion, does plaintiff identify the dates and individuals in any actual drug deal. All of claimant Arlt's chemicals purchased, and subsequent sales of the mixed gold recovery solution to legitimate mining operations, are accounted for. There was no drugs, no drug lab, or even drug paraphernalia present at any location of defendants or claimants.

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CONCLUSION RE: MOTION FOR SUMMARY JUDGEMENT

Plaintiff should be denied summary judgement. The government has not met its "initial responsibility" of demonstrating the absence of a genuine issue of material fact--that is, if taking all the evidence in the light most favorable to the claimant , the government has not shown that no reasonable jury could award the property to the claimant. See Celotex Corp. v Catrett, 477 U.S. 316, 324, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265(1986) When the record now before this court is viewed in a light most favorable to the claimants, there remains genuine issues of material fact concerning, inter alia, whether any "narcotic proceeds" or other illegal activity was the source of the funds and the defendant properties, whether any claimant practiced concealment or disguise of the ownership and control of the properties, whether the claimants failed to file currency transaction reports or IRS 1099 forms for every cash deposit and purchase, and whether any money was laundered at all in light of the claimants evidence and exhibits proving sales of gold and gold recovery solution to legitimate mining customers whom the government has not been able to impeach. See United States v Lot 4, Block S of Eaton Acres, 904 F2d 487 (9th Cir 1990)(Affidavit precludes judgement).

The government has not produced any testimonial evidence that any person heard any claimant ever say that they were investing "drug proceeds" into the purchase of the defendant properties, and into the bank accounts listed herein by the government. All of the persons interviewed by SA Mullins whose affidavit of second hand heresay and opinion is submitted as the government's only evidence, stated that the claimants never discussed any business other than their legitimate gold mining and recovery business or Towing business. Not one person ever stated to IRS SA Mullins that they ever witnessed or heard anything suspicious about the business operations. For this reason, the facts of this case do not entitle plaintiff to judgement.

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CONCLUSION RE: CROSS-MOTION FOR SUMMARY JUDGMENT

The government has not shown a substantial connection to exist between the defendant properties and either of its theories of "narcotics proceeds" nor "money laundering" when there is not a scintilla of evidence under either theory that will rebut or counter the claimants evidence and exhibits attached hereto, and the paper trail of currency transaction reports and IRS 1099 forms filed by claimants for the properties.

The claimants have not only met any burden, assuming probable cause had existed beyond mere suspicion, but also claimants have affirmatively produced evidence to demonstrate the legitimate source of all the defendant properties .

Clearly, the abundant paper trail in the instant case contradicts the profile for properties purchased with "narcotics proceeds" or properties used in "money laundering" and other typical asset concealing operations.

The government has seized and continues to hold the defendant properties upon conclusory allegations that the defendant properties are forfeitable.

The claimants Arlt's and Wren's Declarations are attached as evidence in support of their claims, in opposition to plaintiff's motion, and in support of claimant's cross-motion. Attached to the declaration of claimant Arlt are documentary exhibits A through AB.

Exhibits A,B, and D are letters between claimants' business associates and Calabrian Chemical Corporation showing the purpose of the chemicals purchased and discussing the method of complying with all required regulations.

Exhibit C is a letter to the Drug Enforcement Administration from claimants' business associates to insure compliance with laws, and to reveal the legitimate application of the chemical purchases of hydriodic acid. Exhibits C1 and C2 are correspondence from claimants company to D.E.A. about the solution

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Exhibits E and F are the telephone notes by the D.E.A. agent regarding the purchases by AAA Minerals Company of hydriodic acid from Calabrian Chemical Corporation for the express purpose of leaching gold in solution using electrolysis. The chemical solution mixed at Calabrian for Arlt, and reported properly to the D.E.A. for approval, contained 48% hydriodic acid, 4% hydrocloric acid, and 3% hydrophosphorous acid. The claimants kept all records of the chemical transactions, as required. The D.E.A. was aware or notified of all the chemical purchases where required, the purpose, and the destination. (When the chemicals arrived at Arlt's warehouse, the solution was diluted an additional 18% when the chemical "thiourea" was added. This made the solution undesirable for drug production, but ideal for gold leaching.)

Exhibit G is an advertisement of a competitor company, Bahamian Refining Services, which used nearly identical formulae, and has done so for nearly 20 years. This chemical process is about 50 years old. The owner of Bahamian Refining Services, Mr. Fred Finnel, has discussed this chemical process with the trial prosecutor. Mr. Finnel would testify as a witness for the claimants. There is no question as to the legitimacy of this chemical gold leaching process and claimants' business.

Exhibits H-1 through H-12 are the chemical purchase orders and receipts from AAA Mineral Company to Calabrian Corporation showing the paper trail of chemical purchases for the mining operations and sales.

Exhibits I through O inclusive are the sales receipts from claimant Arlt to numerous gold solution customers in the mining business, all cash sales are documented. All customers are legitimate mining operations.

Exhibits P through V are the reports of police interviews from claimant Wren, his wife Regina, and several other witnesses to the attempted extortion of claimants by member(s) of the San Bernadino Drug Task Force. This was the basis of the criminal and forfeiture cases against claimants,

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and the death of Regina Wren.

Exhibits W through AA are interviews that the police took from the people around Captain Butterfield the night he tried to extort money from claimant Wren, preceeding the arrest of the claimants.

Exhibit AB is a police report of claimants' attorney John Barnett revealing the extortion attempt to the District Attorney for the Drug Task Force, and the claimants offer to cooperate in any way.

Exhibit AC is the December 26, 1990 police interview with claimant James Wren concerning an investigation of a suspect named Ronald Dewbre who had left several vehicles at Highland Towing Company's storage yard. Wren was cooperative and invited police to come to inspect Highland Towing at any time they liked for the company was completely legitimate.

Claimants evidence shows that there are no essential elements, or probable cause, for forfeiture of the defendant properties under either of the government theories.

The government han only offered conclusions upon its suspicions.

The conspicuous absence of any direct connection to narcotics or to illegal activity, when combined with the strong evidence of legitimate sources of the proceeds in the defendant properties, shows that the claimants are entitled to judgement based on the facts, and as a matter of law.

Dated:

Respectfully submitted,

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Claimant in Pro Se

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APPENDIX C

Charles Wesley Arlt
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Claimant in Pro Se

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs $405,089.23 IN U.S. CURRENCY, et al., Defendants, CHARLES WESLEY ARLT, JAMES ELI WREN, and PAYBACK MINES, Claimants.	Case No. CV-91-3264 AET(EEx) CLAIMANTS' STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW, IN SUPPORT OF CLAIMANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Claimants Arlt and Wren, incarcerated and in pro se, hereby submit the following claimants' statement of uncontroverted material facts and conclusions of law pursuant to Central District of California Local Rule 7.14.1. These include every essential element to show claimants' entitlement to a judgment as a matter of law. Claimants' opposition to the plaintiff's motion for summary judgment, and claimants' correction of the plaintiff's erroneous and misleading statement of facts, shows that all of the defendant properties have a legitimate source, an abundant legitimate paper trail, and full compliance with all IRS forms 1099 and all currency transaction report. All references herein in this statement are to those exhibits supporting

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claimants' declarations, cross-motion for summary judgment, and memorandum of points and authorities.

CLAIMANTS' STATEMENT OF UNCONTROVERTED FACTS

1. This in rem forfeiture action was brought against the defendant properties pursuant to a claim by the plaintiff under Title 21 U.S.C. § 881 (a)(6) and Title 18 U.S.C. § 981. Specically, the plaintiff has limited his theory for forfieture to two theories; first, that the defendant properties are forfeitable because the government claims they represent items traceable to illegal narcotics activities in violation of 21 U.S.C § 881(a)(6); and, second, because the government claims the defendants were involved in "financial transactions in violation of 18 U.S.C. §§ 981 and 1956."

2. Claims have been filed in this action by claimants Charles Arlt ("Arlt") and James Wren ("Wren") and Payback Mines. Declarations by claimants Arlt and Wren are submitted herein as evidence, and attached hereto in support of this document.

3. In every single transaction by claimants', or their employees, in which cash, cashier's checks, or money transfers occurred, there was a properly completed and filed Currency Transaction Report, or bank remittance or bank acceptance form, or IRS 1099 form, submitted to the proper authority. The plaintiff knows this fact to be true in every financial transaction, including the wire transfer of funds for the purchase of chemicals for Claimant's gold recovery solution business. There was never any concealment of names of claimant or the source of the funds, or the use of the chemicals purchased.

4. Because of the undeniable fact that a currency transaction report was properly and timely filed in all transactions by claimants in relation to the defendant properties, there is no violation of 18 U.S.C.

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§ 1956 which plaintiff uses to claim forfeiture under § 981. Failure to file currency transaction reports is viewed as a required element under § 1956, and such behavior is not present here.

5. The claimants have unquestionably never attempted "to conceal or disguise the nature, location, source, ownership or control of..." defendant properties, nor the source and use of those properties. The plaintiff has possession of all sales receipts, purchase orders, purchase receipts, vehicle and equipment registrations, and the related banking form or IRS 1099 form or currency transaction form for every defendant property where required by law and there is no trace of concealment or disguise of ownership. Claimants' have at all times left a wide paper trail like any other legitimate business person(s) would do.

6. Because there was no attempt to "conceal of disguise the nature, location, source, ownership or control of..." the defendant properties, and because prior to arrest the claimants had willing invited the police to inspect their businesses, there is no violation of 18 U.S.C. § 1956 which plaintiff uses to claim forfeiture under § 981. Concealment and disguise of the nature, location, source, ownership or control of the defendant properties is an essential and required element under § 1956, and such behavior is conspicuously absent here.

7. No drugs or drug paraphernalia was present at any of the claimants' homes or businesses, and none of the defendant properties were found in connection with use or presence of drugs or drug paraphernalia. In fact there are no drugs found in the presence of any claimant, nor was there any witness ever to claim that the defendant properties were the proceeds from any drug business. The only "witnesses" that the plaintiff can ever produce is a government agent with suspicions and conclusions. There is not even circumstantial evidence.

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8. Claimant Arlt has been in the gold mining business for over twenty (20) years which is verifiable and undisputed by plaintiff. Claimant Arlt had developed a gold recovery chemical solution (similar to other commercially sold gold recovery solutions) that used an electolysis method of extracting micron gold from high grade ore. See Declarations as evidence. Claimant sought approval for obtaining the chemicals, from the Drug Enforcement Administration, on two occassions prior and during his purchasing of chemicals. See Exhibits A through F regarding claimants' compliance with regulations. See Exhibit G of other gold company selling the similar gold recovery chemical solution using about the same ingredients.

9. One of the chemicals used in the gold recovery solution was a bio-degradable solution called hydriotic acid, which is also a chemical used in manufacturing of methamphetamine. However, claimant ordered his purchases of hydriotic acid to be mixed at the factory with hydrocloric acid, which would make the delivered product an undesirable chemical for drug manufacturing. Chemical company records verify the claimants' compliance with the regulations, and that the chemical strength and mixture of hydriotic acid was of such a level as to be undesirable for drug business.

10. Thus, the plaintiff's claim that the chemicals ordered by claimant were for drug manufacturing is false, and such claim was uncorroborated by a single instance of such activity. The plaintiff has not produced one sintilla of drug manufacturing occurring from the claimants's chemical purchases. The plaintiff has only presented mere suspicion.

11. Claimants can account for the purchase and sales of all of the chemicals, by proper record keeping as required by law, which the plaintiff erroneously claims were used for illegal activity. All chemicals were purchased in compliance with law, and sold to legitimate, verifiable mining operations using the electrolysis method of recovering micron gold.

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See Exhibits A thorough N inclusive.

12. There is no mysterious or concealed sources of illegal money. All sources of income are documented and verifiable, as the proceeds of the claimants' gold mining operations and sales of the gold recovery solutions. See Exhibits G through N. Additionally, the plaintiff has possession of other receipts to verify sales.

13. Claimants and the defendant properties all have a paper trail to legitmate sources of income. There is no unexplained sources of income, nor unexplained bank deposits, nor unexplained purchases.

14. No assets were concealed.

15. All defendant properties have a verifiable legitimate source.

16. Currency Transaction Reports were always filed by claimants when required by law.

17. There is no corroborated evidence, nor even a scintilla of evidence of drug activity connected to the defendant properties.

18. Claimants' accountant was notified about the purchases of all vehicles and equipment for the purpose of compliance with tax laws.

19. When claimants purchased the defendant airplane, helicopter, and vehicles at auction, the claimants notified the sellor to file all proper IRS forms for a cash transaction because the claimants would be listing the purchases in their business tax filings.

20. There is no concealment of the fact of who controlled or owned any of the defendant properties.

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CERTIFICATE OF SERVICE

I, CHARLES WESLEY ARLT hereby certify that I have served a true and correct copy of the foregoing

CASE NO. CV 91-3264-AWT (EEx)

CLAIMANT'S OPPOSITION AND CORRECTION TO PLAINTIFF'S ERRONEOUS STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW, AND,

CROSS-MOTION FOR SUMMARY JUDGEMENT

Which is deemed filed at the time it was delivered to prison authorities for forwarding, HOUSTON V LACK, 101 L.Ed 2d 245(1988) upon the defendant/defendants and/or his attorney/attorneys of record by placing same in a sealed, postage prepaid envelope addressed to:

ORIGINAL AND ONE COPY TO: UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
312 North Spring Street
Los Angeles, California
90012

ONE COPY TO: UNITED STATES ATTORNEY'S OFFICE
312 North Spring Street
Los Angeles, California
90012

and deposited same in the United States mail at the U.S. Penitentiary, Lompoc, California on this 26th day of January 1993

CHARLES WESLEY ARLT
26889-048
3901 Klein Blvd.
Lompoc, CA 93436
Claimant in Pro Se

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James Eli Wren
96377-012
U.S. Penitentiary
3901 Klein Boulevard
Lompoc, California 93436

Claimant in Pro Se

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. $405,089.23, et al., Defendants, Charles Wesley Arlt, James Eli Wren, and Payback Mines, Claimants.	DECLARATION OF CLAIMANT JAMES ELI WREN IN SUPPORT OF NOTICE OF JOINDER Etc., and MOTION TO JOIN ALL SUBMISSIONS BY CLAIMANT CHARLES WESLEY ARLT

I, JAMES ELI WREN, declare:

I am the claimant in the above entitled and numbered action. I am presently incarcerated at the United States Penitentiary at 3901 Klein Boulevard, Lompoc, California 93436. I am not a trained lawyer, and I need this Honorable Court's protection of my rights in this action.

In the interest of judicial economy and fairness, I wish to join, and adopt as my own, all submissions, pleadings, motions, and responses, by Pro Se claimant Charles Wesley Arlt.

I am capable of acting on my own behalf. However, I am not trained as a lawyer. I need the Court's protection of my fundamental rights to due process and fairness in this matter.

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James Eli Wren
96377-012
U.S. Penitentiary
3901 Klein Boulevard
Lompoc, California 93436

Claimant in Pro Se

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. $405, 089.23, et al., Defendants, Charles Arlt, James Wren, and Payback Mines, Claimants.	Case No. CV 91-3264-AWT (EEx) NOTICE OF JOINDER BY CLAIMANT JAMES ELI WREN, AS HIMSELF, AND DOING BUSINESS AS CLAIMANT "PAYBACK MINES", AND AS VICE-PRESIDENT, AGENT OF SERVICE FOR CLAIMANT "PAYBACK MINES"; AND MOTION TO JOIN ALL SUBMISSIONS BY CLAIMANT CHARLES WESLEY ARLT

Claimant, JAMES ELI WREN, as himself, and doing business as (DBA) claimant PAYBACK MINES, and as vice-president and agent of service for claimant PAYBACK MINES, hereby gives notice of joinder, and moves to join, and adopt as his (their) own, all submissions, pleadings, motions, and responses, by Pro Se claimant Charles Wesley Arlt, from this time forward, without exceptions.

Dated: January 26, 1993

Respectfully submitted,

JAMES ELI WREN
96377-012
Lompoc, California

I am the vice-president and agent of service for PAYBACK MINES INC., a Nevada Corporation. I am legally the correct person to act on behalf of claimant PAYBACK MINES.

I am submitting this notice of joinder, motion to join, and declaration in support, in good faith and not for any dilatory reason.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on January 26, 1993.

JAMES ELI WREN
Claimant in Pro Se as
himself, and as vice-president
and agent of service for
claimant "PAYBACK MINES"

CERTIFICATE OF SERVICE

I, JAMES ELI WREN hereby certify that I have served a true and correct copy of the foregoing

NOTICE OF JOINDER
MOTION TO JOIN
DECLARATION IN SUPPORT OF

Which is deemed filed at the time it was delivered to prison authorities for forwarding, HOUSTON V LACK, 101 L.Ed 2d 245(1988)

upon the defendant/defendants and/or his attorney/attorneys of record by placing same in a sealed, postage prepaid envelope addressed to:

ORIGINAL AND ONE COPY: UNITED STATES DISTRICT COURT
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312 North Spring Street
Los Angeles, California 90012

and deposited same in the United States mail at the U.S. Penitentiary, Lompoc, California on this 26th day of January 1993

JAMES ELI WREN
96377-012
3901 Klein Blvd.
Lompoc, CA 93436

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APPENDIX D

CHARLES WESLEY ARLT
26889-048
U.S.Penitentiary
3901 Kline Boulevard
Lompoc, California 93436

Claimant in Pro Se

FILED
MAR 23 1992
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY CLERK

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. $405,089.23 U.S. CURRENCY; et al., Defendent and CHARLES WESLEY ARLT, JAMES WREN, PAYBACK MINES Claimant.	No. CV 91-3264 AWT(EEx) CLAIMANT'S MOTION TO STRIKE ERRONEOUS PORTIONS OF "PLAINTIFF'S REPLY TO CLAIMANTS OPPOSITION TO MOTION FOR SUMMARY JUDGMENT: MEMORANDUM OF POINTS AND AUTHORITIES."

Incarcerated claimants in pro se move to strike certain inaccurate and erroneous portions of the "Plantiff's reply to claimants' opposition to motion for summary judgement: Memorandum of points and authorities"

MEMORANDUM OF POINTS AND AUTHORITIES

SUMMARY OF FACTUAL ERRORS

The plaintiff has misstated at 3:12 that "Possession of such an extremely large amount of cash is highly consistent with someone involved in narcotics, according to numerous Ninth Circuit cases." Every Ninth Circuit case concluding that cash was

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consistent with narcotics activity included a definite factual finding that presence of cash must be "in combination with other persuasive circumstantial evidence" particularly the presence of drugs or drug paraphernalia. Thus the plaintiff is mistaken that the mere presence of a large amount of cash is dispositive of narcotics activity. In this case, drugs and drug paraphernalia are conspicuously absent from the criminal case and in every purchase or use of the defendant properties.

The plaintiff is mistaken at page 3:15-21 that claimiants' questionable jury convictions alone are enough to establish probable cause. The prosecutor uses cases of "guilty pleas" convictions where the defendents had admitted that the forfeiture property was directly connected or used in drug activity or was the proceeds for drug business. However there is no reported cases that claimant could find where a "jury trial conviction" was an automatic probable cause for forfeiture unless the defendant or other witness testimony directly linked the forfeiture property to proceeds from drug activity or the property was used to facilitate the drug transaction. Similarly, there are no reported cases of of forfiture of property under a money laundering theory unless there was direct evidence that the property was used to facilitate, or was proceeds from money laundering activity. In the instant case, the plaintiff has absolutely no evidence of any drug tranaction anywhere.

At 4:11 to 4:18 the prosecutor plaintiff is mistaken when he claims that the claimants have not provided specific facts on which a "reasonable fact finder could conclude that the defendant properties were not the proceeds" of the vague and fabricated

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illegal drug activity presented by the prosecution. The prosecutor filed for summary judgment yet he has completely failed to reveal a single instance of a drug sale, a drug possession, a drug lab, a drug buy, a drug "cook", or even a single witness to any actual drug deal. Nowhere is there an actual drug crime except for the amazing conviction based only on government shining-star-police-witness-expert-speculators. There was not a scintilla of real evidence of any illegal activity in this underlying conviction now in the court of appeals. The jury admitted confusion. Claimants have specifically pointed to these above facts that there was no drug business, and they cannot be estopped from the truthful claim that all the defendents were innocent of the charges.

Thus, the claimants affidavits,sworn under the penalty of perjury, are competent declarations by the most knowledgable parties to this action, and the affidavits must be accepted as true and they create a material issue of fact. The defendant's affidavit in United States v. Lot 4, Block 5 of Eaton Acres, 904 F2d 487 (9th Cir 1990) precluded summary judgment. The same priciple is applicable here to preclude summary judgment.

At page 5:6 to 6:7 the plaintiff is mistaken about his theory of estoppel. The claimants' erroneous conviction does not estop them from arguing the truth that they were in the gold mining business, and not an illegal business. There was no finding that the claimant's gold mining operation was not valid. Charges that the defendants were nothing more than drug dealers is a theory concocted by the zealous government agents operating outside the law.

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The claimants can find no case law that prevents the telling of truth.

Moreover the prosecutor has used the wrong legal precedent in his "three-step" estoppel claim using a state court case. The correct precedent to apply here is United States v. Real Property located at Section 18, 976 F2d 515, 518 (9th Cir 1992) which sets forth a four-step criteria for the application of collateral estopple.

Again the case is based on a "guilty plea". Howerer, this Circuit has ruled that the issue "estopped" must have been conclusively decided at the prior criminal proceedings. In the instant case, none of the defendant properties were proven to have been purchased by claimants with drug money laundering proceeds, nor were any of the defendant forfeiture properties proven to have been used to facilitate or conceal drug transactions, drug proceeds, or money laundering activities. Thus, claimants are not bound by the prosecutor's misunderstanding of estopple in this case. The issues about the defendant properties were never given full and fair litigation opportunity, thus there is no estopple.

At page 6:26, the plaintiff disparages the claimants' evidence provided in their sworn affidavits. Evidence to the contrary, the plaintiff contends that the claimants have "failed to offer tax returns or any tax related documents tending to establish that they reported legitimate income to the Internal Revenue Service." First, claimants are not required to provided their tax returns in this matter. Secondly, the plaintiff has in his possession all of claimant Arlt's tax records seized

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either from the Certified Public Accountant who was preparing the tax returns, or seized from Arlt himself. Thus, it is improper for the plaintiff to infer that any tax returns are not presented when he knows that the tax returns were being prepared at the time of arrest, and that the government has seized those records. If plaintiff would produce the claimant's tax records and files in discovery, all income could be verified as being legitimate, and a tax return could be completed.

Indeed it is the government who has failed to ever produce a single drug customer, or single drug transaction, or a single drug lab, or a single instance of a true money laundering activity, or a single instance where the claimants ever concealed any asset, or failed to immediately file (or cause to be filed) all required currency transaction reports and IRS 1099 forms. The governments case is a naked assessment without any foundation in fact and is based soley on the misscarriage of justice in the underlying criminal case convictions which are now on appeal.

At page 7, the plaintiff claims shock that the claimants Arlt and Wren, and their five other witnesses, reported the extortion attempts by the police investigators in this case. The plaintiff cannot be so sheltered from the world of drug law enforcement that he does not realize the very high statistical lidelihood of narcotics police agents using extortion and taking money from drug dealers. The newspapers are full of these "crooked police" stories that the court may take judicial notice of because the same scenario is commonplace in both the state, county, city, and federal drug law enforcement business. In this

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case, the extortion attempt is well documented because the claimants Arlt and Wren, and the murdered main witness Regina Wren, and five others, reported this crime to an attorney and the local police. Unfortunately this strategy got Regina Wren, the main witness, killed by the same special drug task force which conducted the investigation. (There are other witnesses available to verify other extortions and drug sales by this same task force).

It is highly improbable that the plaintiff will clean up his own house. The investigation by the San Bernardino District Attorney's Officer of its own special drug task force was merely a sanatizing. It is highly improbable that the claimants would go to the police to report the crime, and volunteer to be available for the police, as well as notify the DEA of their chemical purchases in advance, if the claimants were actually conducting an illegal drug business.

At 7:6, the plaintiff's legal authorities are misapplied here: Johnson v Washington Metro. Area Transit Authority, 883 F2d 125, 128 (D.C. Cir. 1989) and Stitt v Willams 919 F2d 516 (9th Cir.1991). In those cases, the contentions of the declarant were contested by other witnesses. That is not the case here where both the claimants Arlt and Wren corroborate each other about the extortion, and there are five other supporting witnesses' affidavits without a single witness affidavit contesting or disputing the extortion attempt, or the legitimacy of the gold mining business.

At page 8:2 to 14, the plaintiff is mistaken on the law of this curcuit that hold that a claimant's sworn affidavit

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is sufficient to provide a material issue of fact to prevent summary judgment. In this case, there are two claimants' sworn affidavits that are evidence that no defendant property was ever purchased with drug proceeds or money laundering proceeds.

At page 8, footnote 2, the plaintiff mistates the recond in the criminal trial when he erroneously claims that the issue (of claimants'business of selling chemicals for gold mining) was previously litigated. There was no full and fair opportunity to litigate anything about the claimants' gold mining chemical sales business. The issue is not precluded because it was not litigated.

Plaintiff has no basis for this forfeiture other than the mere conviction. Claimants request a common sense approach to review of their exhibits, receipts, and sworn affidavits. The prisoner claimants are financially destroyed, in pro se, untrained in law, and denied access to their own records and files in this case which the plaintiff already has in his possession.

At page 8:16 to page 10, the plaintiff contends that the claimants' cross motion for summary judgment should be denied on a mere technicality scheduling. The plaintiff has been well aware of the fact that claimants' previous counsel from the Center for Constitutional Law are under investigation for abandonment of hundreds of clients, including the claimants. It appears very unfair for the prosecutor to take advantage of such a problem. There is ample excusable neglect and good cause for lateness of claimants' opposition and cross-motion for summary judgment.

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At page 9:5 to 9:23 the plaintiff lists eight contentions that he says are uncontroverted, yet he does not present the entire picture.

(1) Claimants were convicted of a vague conspiracy to manufacture methamphetamine in an unusal trial. Trial police witnesses admitted that no drugs nor required ephredrine were ever found and connected to the claimants' case. The conviction will likely be reversed on appeal for insufficiency of evidence. There are simply no drug lab or even precursor chemicals present or connected to claimants, or the properties, that are necessary to manufacture any drugs. There is not a scintilla of drug business evidence, not even a witness to testify to any illegal activity of anykind having to do with claimant Arlt's mining chemicals or his mining business.

(2) Claimants were convicted for conspiracy to launder monetary instruments yet there is not a single insident of concealment of the funds legally derived from gold mining solution sales. There is not a scintilla of evidence of any money transaction that was not in complete compliance with law. Currency transaction reports and IRS form 1099s were scrupulously filed when necessary, and all other persons with whom the claimants conducted business were specifically told to report the cash transactions. The plaintiff is creating a new legal threshold for criminal activity called the "any cash equals a crime" standard. Not so long ago, men (and women) conducted business in cash as a normal practice. Now it appears to be a mark of criminal activity. There is no evidence of money laundering and these convictions will be reversed on appeal for insufficiency of evidence.

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(3) Claimants were indeed convicted of all counts by a very confused jury despite the lack of evidence. There were only police witness "experts" and no eyewitnesses to any drug activity or money laundering activity not even by police officers.

(4) Jim Rocky Hill was indeed convicted for "laundering the $405,089.23 that is the subject of this action" in a manner that is completely without any basis for the conviction. There is no evidence of money laundering, only a bald conviction that will be reversed on appeal as a matter of law and for insufficiency of evidence. Claimant Arlt readily admitted transferring his $405,089.23 to Hill's account in order to have the money on hand to pay to the IRS on Arlt's 1990 taxes. This intention was known to Hill, the C.P.A. preparing the taxes, Jim and Regina Wren. (It is inconceivable that anyone would be convicted of money laundering to the IRS, as occurred here).

(5) Payback Mines did not control the bank accounts with the $8,929.93 that is a subject of this action. It was Highland Towing Company that controlled the account, and there is no criminal activity in this account ever demonstrated.

(6) Claimants did indeed purchase the Piper Cherokee 6 airplane, Bell 47 heliocopter, Stormy Seas Four shrimp boat and eleven vehicles with cash and with all currency transaction reports, or IRS 1099 forms completed or in the alternative, the seller was notified by the claimants to file the appropriate form in compliance with law. Cash is still not illegal per se. Cash is a customary and normal medium of exchange in the precious metals business because the precious metal can be abscounded with on a bad check, and never be found. At this very same time the banking

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and savings and loan industry offices were closing their doors, being taken into receivership, and going out of business because the banks had lost the depositors' money. In the 1989-90 era, use of banks to handle your money was a risky decision. The cash used for the claimants' purchases was entirely legal and no suspicious behavior was present in any transaction. The ownership of the vehicles was not concealed.

(7) These cash purchases, totalling $253,700, did indeed occur within approximately a thirty-five day period from December 30, 1990 to February 1, 1991. This is an irrelevant fact and has no inherently illegal quality to it. Claimants had made their purchases in the beginning of the tax year 1991. All purchases would be vehicles and equipment used in business or trade to obtain profit. This is not illegal. Claimants' trial testimony indicated the fact that the use of cash in 1991 was based on the high rate of bank failures in this country at this time and that claimant Arlt did not trust banks. Many citizens do not trust banks.

(8) Wren did not deliver $123,000 to his sister's Bail Bond business and there is no record of this claim by the prosecutor. Arlt testified that there was actually $153,000 in cash, but that $30,000 disappeared as the police transported the money to the San Bernardino Sheriff's Department. (The same sheriff's department that is already accused of illegal drug activity and extortion) The trial evidence shows that the police took the money. Otherwise, there is nothing illegal about the claimants' keeping money in a vault at the Bail Bond office. No criminal activity is connected here.

At page 9:20 to 10:2 the plaintiff mischaracterizes the

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four case authorities by claiming "[t]he purchase of property with large amounts of cash and possession of 'an extremely large amount of cash'(a vague term without qualification here) is highly consistent with someone involved in narcotics, according to numerous Ninth Circuit cases."(citations omitted). Each of those citation specifically states that cash in the presence of other persuasive evidence, such as drugs or drug paraphernalia. There is no reported case, relying on were the presence of cash alone, without the presence of drugs of other paraphernalia. In the instant case, the prosecutor cannot point to any drug presence not even a scintilla worth, that is connected to the cash, the bank accounts, or any of the defendant properties. It was not proper for the plaintiff to mischaracterize the legal authority in this brief. United States v. Padilla, 888 F2d 642, 643-644 (9th Cir 1989) makes this issue very clear. The law of the circuit required more that "mere presence" of cash, and the miscarriage of justice convictions are not sufficient propable cause.

CONCLUSION

Contrary to the amazing claim by the plaintiff that the convictions alone establish problable cause to believe that each and every one of the defendant properties is forfeitable, there must have either been a full and fair litigation oppourtunity on the source of each property, or there must have been some drug activity or drug presence connected to each property. Neither condition is met by the facts in evidence. The claimant's convictions are incredible because there was never any drugs or even ephredine found in connection to the claimants mining solution business. There is ample evidence that the mining

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solution is a genuine commercial product that is nearly identical to the solutions sold by other precious metal refining companies. The actual existence of claimants' mining claims and gold sales confirms the legitmate nature of claimants' activities in connection to the defendant properties. During the criminal trial two agents of the Drug Enforcement Agency testified that they had investigated AAA minerals and the purchase of the hydriotic acid for the mining solution, and that they determined that the company was legitimate, and that the chemical purchases were for legitmate reasons.

Accordingly, the claimants respectfully request that the Court deny the plaintiff's motion for summary judgment, and that the Court grant the claimants' cross-motion for summary judgment.

DATED: MARCH 17, 1993.

Respectfully Submitted,

CHARLES WESLEY ARLT
26889-048
Claimant in Pro Se

JAMES ELI WREN
96377-012
Claimant in Pro Se

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CERTIFICATE OF SERVICE

I, CHARLES WESLEY ARLT hereby certify that I have served a true correct copy of the foregoing

CLAIMANT'S MOTION TO STRIKE ERRONIOUS PORTIONS OF "PLAINTIFF'S REPLY TO CLAIMANTS OPPOSITION TO MOTION FOR SUMMARY JUDGMENT: MEMORANDUM OF POINTS AND AUTHORITIES."

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312 NO. SPRING STREET, G-8
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U.S. ATTORNEY OFFICE
312 NO. SPRING STREET ---------- ONE COPY
LOS ANGELES, CALIFORNIA 90012

d deposited same in the United States mail at the U.S. Penitentiary, Lompoc, lifornia on this 17 day of MARCH 19 93

CHARLES WESLEY ARLT
26889-048
3901 Klein Blvd.
Lompoc, CA 93436

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APPENDIX E

CHARLES WESLEY ARLT
26889-048
3901 Klein Boulevard
Lompoc, CA 93436

Claimant in Pro Se

FILED
APR 16 1993
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY CLERK

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs $405,089.23 in U.S. CURRENCY, et al., Defendant. and CHARLES WESLEY ARLT, JAMES ELI WREN, AND PAYBACK MINES, INC., Claimants.	Case No. CV 91-3264 AWT(EEx) CLAIMANTS' MOTION FOR RECONSIDERATION OF APRIL 1, 1993 ORDER GRANTING SUMMARY JUDGMENT TO PLAINTIFF, PURSUANT TO LOCAL RULE 7.16 AND, STATEMENT OF GENUINE ISSUES

Claimant in pro se, Charles Wesley Arlt, incarcerated and joined by all other claimants to this action, hereby moves this court for reconsideration, pursuant to Local Rule 7.16, of the April 1, 1993 Order of this Court granting Summary Judgment to the plaintiff. The grounds for this motion are a) there were substantial genuine issues of material fact by the opposing party claimants that were not reviewed, supported by evidence, (L.R. 7.16(a)) and b) there was a manifest showing of a failure to consider material facts presented to the Court before such decision. (L.R. 7.16(c)).

This motion will not repeat any argument given review.

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BACKGROUND

The plaintiff moved for summary judgment of December 4, 1992, without service to the claimants. Claimants received service of the Motion for summary judgment on December 29, 1992.

Claimants Arlt,Wren, and Payback Mines, Inc., have joined to oppose the motion for summary judgment by filing opposition to the motion for summary judgment on January 29, 1993, which contained a statement of genuine issues of material facts that were clearly in dispute to the plaintiff's claims.

At the same time, the claimants filed their cross-motion for summary judgment, with points and authorities, and supported with evidence and sworn declarations from claimants as to the legitimate source of the defendant properties and monies. The documents were given to the prison officials to mail.

On February 3, 1993, the plaintiff replied to the claimant's opposition to the motion for summary judgment.

On February 18, 1993, claimants filed a request for leave to file a supplemental opposition to motion for summary judgment, and for a thirty (30) day extension of time to oppose the plaintiff's opposition of February 3, 1993. The basis of this motion was that numerous factual errors contained in the plaintiff's reply were prejudicial to claimants, and untrue contentions. Additionally, a thirty (30) day extension of time was necessary to prepare the claimants' opposition because to the difficulties in prison of access to the law library and typewriters. Often there are lockdowns without notice. Writing a legal document, or doing legal research, takes much longer for incarcerated persons.

On March 17, 1993, Claimants filed their motion to strike the erroneous portions of the "plaintiff's reply to claimants opposition to motion for summary judgment: memorandum of points and authorities." Prisoner claimants delivered that document to the prison officials for forwarding to the court.

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however, the clerk of the court filemarked the document on March 23, 1993.

A. THE DISTRICT COURT DOCKET INDICATES THAT CLAIMANTS' OPPOSITION PAPERS AND MOTION TO STRIKE ERRONEOUS FACTS IN PLAINTIFF'S MOVING PAPERS WAS NOT FILED

The claimants obtained a copy of the court docket of this case on March 29, 1993. Exhibit A. There is no entry of any of claimants' responses and oppositions to the motion for summary judgment, and thus it is likely that the district court did not give full review to the claimants' opposition to summary judgment and the lists of genuine issues of material facts that are in dispute with plaintiff's contentions.

There is a clear injustice in the case if the claimants' opposition to this unlawful seizure of property is not given full and fair review. There is no explanation on the docket of March 29, 1993, why claimants' responses and oppositions have not been docketed. There is no indication that the district court ever saw claimants' oppositions and responses before giving the government all of claimant's property valued in the millions.

Further, if the district court had read the pro se incarcerated claimants' responses, oppositions, and inventory of genuine issues of disputed material facts, and made a full and fair review of the factual dispute to the government's false claim, then the district court would not have granted the government's motion for judgment, as a matter of law,because the government was not entitled to judgment in its favor.

B, THE PRO SE CLAIMANTS' OPPOSITIONS, SWORN DECLARATIONS, EVIDENCE, AND EXPOSURE OF PLAINTIFF'S FALSE FACTS, SHOULD HAVE BEEN CONSTRUED LIBERALLY AS GENUINE ISSUES OF MATERIAL FACTS WHICH DEMONSTRATED, AS A MATTER OF LAW, PLAINTIFF WAS NOT ENTITLED TO JUDGMENT.

Pro se incarecerated litigants' pleadings are to be construed liberally

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according the Haines v. Kerner, 404 U.S. 519, 520 (1972) and a string of Ninth Circuit cases. Here, the Court should have construed pro se claimants' oppositions and motions to strike erroneous facts as statements of genuine issues of material facts which preclude summary judgment for the plaintiff.

This order is a terrible injustice to claimants and to the integrity of the judicial system because the plaintiff's affidavit and claim is tainted with the introduction of completely false accusations, alterations of truth, half-truths, alleged observations, conclusions "based on experience" and complete fabrications. The court must take judicial notice that there was never any ephedrine, methamphetamine, or glassware ever found in any location owned or controlled by claimants. The hydriotic acid is commonly used in similar gold-leaching, electroplating solutions.

Additionally, claimants' declarations were sworn under the penalty of perjury and stated the truth which directly refutes the plaintiff's erroneous claims. Those sworn declarations are sufficient by law, as evidence, to prevent summary judgment for the plaintiff.

1. **THE COURT DID NOT GIVE FULL AND FAIR REVIEW TO CLAIMANTS' STATEMENT OF GENUINE ISSUES OF MATERIAL FACTS IN DISPUTE WITH THE PLAINTIFF'S "STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW", AND IF THE COURT HAD GIVEN SUCH REVIEW, THE RESULT WOULD HAVE BEEN DIFFERENT.**

The plainitff's "Statement of uncontroverted facts and conclusions of law" is highly inacurate, false in spots, inaccurate in spots, and erroneous in its unsupported (or falsely supported) conclusory claims. The plaintiff's contentions are great injustice, and are disputed by claimants as genuine issues:

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1. In plaintiff's ¶ 1, the truth is that none of the defendant items and properties are in fact derived from, or traceable to, or exchanged or used to facilitate, or conceal, or "involve in," any illegal or narcotic trade activities subject to Title 21 U.S.C. § 881 (a)(6) or Title 18, U.S.C. §§ 981 or 1956. There was never any specific drug transaction, or specific drug activities ever proved at the related criminal trial for indictment CR-329 (A)-DT. There was no connection between the defendant properties and any illegal activity at the criminal trial - none !

2. Plaintiff's first sentence is true. The second sentence is completely false. Only Arlt, Pierce, and Richard Lee were in the business of purchasing chemicals, as AAA Mineral Company, for Arlt's sales of a new mixture used in gold extraction by electrolysis. Wren operated Arlt's business Highland Towing with the assistance of James Hill. Kuhnle was a laborer for Wren. Gage had nothing to do with any of Arlt's business. House was a metallurgist and assayer for the ongoing gold mining business.

4. The sentence is false in that it claims that the chemicals were used for the manufacturing of methamphetamine. There was no such intent proved in the intire trial. No witness ever claimed to have purchased chemicals from claimants in order to make methamphetamine. Although some of the mining chemicals could have been used in drug manufacturing, none of claimants' chemical orders were ever used for illegal purpose or for any purpose other than the mining operation. Indeed, the chemicals purchased are some of the most widely used general purpose chemicals on the market. Absolutely no ephedrine, glassware or other essential methamphetamine ingredients was ever connected to the chemical purchases for the mining operation, and the Government did not have a single witness to any illegal acts.

Note: Plaintiff did not have a paragraph 3, and claimants wish to keep their answers correctly aligned to plaintiff's paragraph numbering, for clarity.

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5. The sentence is false. Only Claimant Arlt, and his aunt Deanna Marie Pierce, made the mining chemical purchases. Each and every purchase was cleared by notice to the Drug Enforcement Agency. Each and every chemical was intended for, and actually used for, the recovery, refining and finished production of micron gold. Complete records were kept for all purchases and sales of the chemicals. How can this be illegal ?

6. The sentence is true and nothing illegal is presented.

7. There was never a conspiracy to manufacture any amount of methamphetamine or any mixtrue containing any detectable amount of methamphetamine. Those businesses were legitimate. Second sentence reference to Exhibit 3 at 5, ¶ 1 is false.

8. Both these sentence are false. Defendant Arlt's mining operations were ligitimate. The chemicals purchased were ordered mixed with other chemicals to create a new solution for extraction of micron gold from high grade ore by electrolysis. This was a standard business practice done by many mining businesses.The new solutuon was sold in good faith to other legitimate mining customers. None of the solutions or chemicals ever made their way into drug dealers hands nor is there any witness or informant that testified in court that the chemicals purchased from Calabrian Chemical Company were ever used in the manufacture of any type of illegal drugs.

9. This paragraph is unfortunately and unjustly true. A direct appeal is pending. There were no witnesses that corroborated any Government claims. The convictions are a complete miscarriage of justice. Claimants are truly innocent.

10. Same as above.

11. Same as above. Hill was innocent yet convicted. Third and fourth sentences refer to Exhibits 1, 2, and 3, at ¶¶ 115, 116. 116 is completely false in all claims that Hill abmitted any illegal activity or money laundering

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12. First sentence is true. Second sentence is false, there was $153,000 in U.S. currency in the box. The police appear to have "lost" (stolen by police) $30,000 on their way to the station. The box was in a walk-in safe located at Mayhill Bail Bonds. This safe was used by claimant to store valuables for short periods of time. Reference to Exhibit 3 at ¶ 125 fails to mention 10 ounces of gold and 10 ounces of platinum that appear to have disappeared during the search. Again the police stole defendant's property.

13. First sentence is false. Second sentence, Exhibit 1 at ¶ 84 is false.

14 Unfortunately and unjustly true. Wren was illegally and unconstitutionally convicted although he was innocent of the charges.

15. First sentence is true. Second sentence, Exhibit 3 at ¶ 125 is false, (see #12 above). Third sentence is partially true, see #12. Fourth sentence is partially true, see #12.

16. True. Nothing herein is illegal.

17. First sentence is mischaracterized and misleading and therefore denied. Mr. Arlt (Chuck) Bailed out a few friends on occassion and "Millie" was a friend who needed as much business as she could get. All the bails were small and all the bailees appeared for court dates.

18. First sentence is true, second sentence is true, third sentence is true, fourth sentence is true. This was all legal activity.

19. First sentence is true, second sentence is true, third sentence is true, fourth sentence is false. Exhibit 3 at ¶¶ 115, 117, are irrelevant not illegal.

20. True.

21. True.

22. First sentence is vague and ambiguous and is denied as false on those grounds. Exhibit 3 at ¶ 121 is true.

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23. First sentence is true. Second sentence Exhibit 3 at ¶ 122 is partially true, no gun was ever involved, as testified to at trial. Third sentence is false, denominations of cash were large not small. Fourth sentence is false. There was no gun anywhere. Fifth sentence is false, the boat is not in dry dock. Federal Officers moved the boat, and in the process damaged it, let it sink on purpose, despite claimants posting of a $5,000.00 bond to insure the boats safekeeping.

24. True, except for the description of payment and denominations of currency. Cash was in large denominations only. Same is true for Exhibit 3 at ¶ 123.

25. True. Exhibit 3 at ¶ 124 is true except for sentence 5 and 6 which misidentify "tailings" as "trailings". In sentence 6, only sampling was occurring in Nevada not production nor "trailing[sic]".

26. True. except that paper bag did not appear to have been buried, it was a plain, brown, crumpled paper bag. Exhibit 3 at ¶ 128 is partially true. The paper bag had not been buried, six cars were towed, five were driven, and the boat was towed behind one of the vehicles that was driven away.

27. First sentence is true. Second sentence in reference to Exhibit 3 at ¶ 129 is false. Jim Wren never possessed a gun or a badge. It is a fact that Deputy Eroe could not even identify Jim Wren at trial.

28. True.

29. True.

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CONCLUSION

The district court order made no mention of reviewing any of the claimants' oppositions, genuine issues of material facts in dispute, the motion to strike plaintiff's erroneous facts and claims, nor the pro se claimants' affidavits sworn under penalty of perjury.

The clerk's docket (exhibit A) of March 29, 1993 shows that claimants have been denied access to the court for review of their responses and defenses from the Government's wrongful conversion of private property under the guise and fiction of alleged illegal activity.

Summary Judgment for the plaintiff is incredible unjust when there are so many disputed material facts which were presented in the plaintiff's complaint and motion for judgment. Many of the claims presented in the plaintiff's affidavit were contrary to actual trial testimony, and concessions on cross-examination of the agents, that are on record in the underlying criminal trial of claimants in this matter.

The court must take judicial notice that there are no witnesses whatsoever produced by the government to any illegal act of drug trafficking, manufacturing, or money laundering.

The court must take judicial notice that there was no illegal purchase of chemicals because the D.E.A. rules were conplied with.

The court must take judicial notice that all money transaction had all proper and required forms completed.

The court must take judicial notice of the law that requires some connection of the defendant properties to some illegal activity before forfeiture is permitted, and that there is no illegal activity proved herein in fact, but rather illegal activity is "conclusory" upon speculation of agents and untruthful claims by agents who have no corraboration for any illegal act they claim.

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WHEREFORE, based on the above matters, and the verification of this document under penalty of perjury,claimants request the court to reconsider the Order of April 1, 1993, granting summary judgment to the plaintiff, and to review all of the claimants' responses under the "pro se" standard of liberal construction, and to view all the oppositions by claimants as "STATEMENTS OF GENUINE ISSUES" pursuant to Local Rule 7.14.2 and 7.14.3, and to reconsider the claimants' cross-motion for summary judgment.

Dated: April 9, 1993

Respectfully submitted,

JAMES ELI WREN, incarcerated
Pro Se claimant

CHARLES WESLEY, ARLT, incarcerated
Pro Se claimant,

VERIFICATION

I, JAMES ELI WREN, incarcerated pro se claimant, hereby declare under penalty of perjury that the above matters are true and correct to the best of my knowledge, belief, and information.

DateD: April 9, 1993

JAMES ELI WREN

I, CHARLES WESLEY ARLT, incarcerated pro se claimant, hereby declare under penalty of perjury that the above matters are true and correct to the best of my knowlegde, belief, and informations.

Dated: April 9, 1993

CHARLES WESLEY ARLT

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

OFFICE OF THE CLERK
U.S. COURTHOUSE
LOS ANGELES, CALIFORNIA 90012

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE $300

U.S. MAIL
FEE PAID
UNITED STATES COURTS
USC 426

Resp. App. 81a

Charles W. Arlt 26889-048
3901 Klein Blvd.
Lompoc, CA 93436

CLERK'S OFFICE U.S.D.C.
LOS ANGELES
03/29/93 3:29:16 PM
LA 1 REB 1 Receipt # 089345
CODE # 91-3264
322150 COPY FEES 1-50
***** T O T A L ******* 1-50
CHECK TENDERED 1.50
THANK YOU

DIST	OFF	DOCKET YR.	DOCKET NUMBER	FILING DATE MO.	DAY	YR.	J	N/S	O	D PTY	D DEF	R 23	$ DEMAND	JUDGE/ MAG. NO.	COUNTY	JURY DEM.	DOCKET YR.	DOCKET NUMBER
													Amount $1,000	J 7320				
0973	2	91	3264	06	17	91	1	670	1					M	06037		91	3264

TITLE USA-V-$405089 U S CURRENCY

CAUSE CNFISCATION FORFEITURE 21:881 AMI(EX)

UNITED STATES OF AMERICA,

Plaintiff,

v.

$405,089.23 U. S. CURRENCY;
$8,929.93 U. S. CURRENCY;
$123,000 U.S. CURRENCY;
ONE BELL 47 G-2 HELICOPTER,
U.S. Registration Number N59H;
STORMY SEAS FOUR (SHRIMP BOAT)
official number 2159;
ONE PIPER CHEROKEE 6 AIRPLANE;
ONE HUNDRED THIRTY-EIGHT (138)
SILVER BARS;
ONE 1985 JAGUAR,
VIN: SAJHV5842FC119348;
ONE 1981 WELLCRAFT,
VIN: HALLWELT1593G788;
ONE 1988 JAGUAR,
VIN: SAJHU164JC530324;
ONE 1986 PORSCHE,
VIN: WPOAA0940GN454897;
ONE 1988 JAGUAR,
VIN: SAJAV1643JC521364;
ONE 1986 CHEVROLET,
VIN: 1G8CS18RXG0140772;
ONE 1988 MITSUBISHI,
VIN: JA7FL24D9JP0505914;
ONE 1987 NISSAN,
VIN: JN6ND11S3HW033709;
ONE 1987 SUZUKI,
VIN: 1S4JC51C2H4154485;
ONE 1988 Jeep,
VIN: 2BCHV8157JR523469;
ONE 1988 Chevrolet,
VIN: 1GCFC24K0JZ253793;
ONE 1983 Chevrolet,
VIN: 1G8CS18B9D8132968,

Defendants.

MARK A FELDMAN
AUSA
300 NORTH LOS ANGELES STREET
LOS ANGELES CA 90012
(213)894-2569

Lydia B. Sanchez
4741 Laurel Canyon Blvd. Suite 200
North Hollywood CA 91607
(818) 505-0202
atty for clmnt Charles Arlt

Kenneth D. Miller
701 N. ParkCenter Dr Ste 103
Santa Ana, CA 92705
(714) 543-2570
Atty for Claimant James Wren

CARMINE COLLUCCI
629 So Sixth Street
Las Vegas, Nevada
(702) 384-1274
Atty for Claimant Charles Arlt & Payba Mines.

Lydia Sanchez
4705 Laurel Canyon Blvd Suite 207
North Hollywood, CA 91607
818-505-0202
Clm Charles Hart

OFFICE USE ONLY: AMOUNT PAID / APPLYING IFP	DATE	FILING FEES PAID: RECEIPT NUMBER	C.D. NUMBER	STATISTICAL CARDS: CARD	DATE PUNCHED

jcw	1. Complt. Issd W/A. Case maybe ref'd to Mag judge Judge Eick for discov.
gk	2. Retn of USM 285 of Complt/Notc/Warrant currency seized $537,678.54, publication date 7/3/91, executed on 7/3/91.
gk	3. Retn of USM 285 of Complt/Notc/Warrant currency seized $537,678.54, publication dated 7/7/91, executed on 7/3/91.
gk	4. Retn of USM 285 of Complt/Notc/Warrant currency seized $537,678.54, publication date 7/3/91, executed on 7/3/91.
gk	5. Retn orig warrant for arrest.
am	6. Proof of pbulication in the LA. Daily journal exc'td on 7-8-91
ca	7. Retn USM 285, Complt/Notc/Warrant, Seize on 7/18/91 1986 Porsche.
	8. Retn USM 285, Complt/Notc/Warrant, Sieze 1985 Jaguar on 7/18/91.
	9. Retn USM 285, Complt/ Notc/Warrant, Seize 1988 Mitsubishi on 7/18/91.
	10. Retn USM 285, Complt/Notc/Warrant, Seize 1986 Chevrolet Blazer S10 on 7/18/91.
	11. Retn USM 285, Complt/Notc/Warrant, Seize 1987 Nissan on 7/18/91.
	12. Retn USM 285, Complt/Notc/Warrant, Seize 1988 Jeep Comanche on 7/18/91.
	13. Retn USM 285, Complt/Notc/Warrant, seize 1988 Chevrolet 2500 on 7/18/91.
	14. Retn USM 285, Complt/Notc/Warrant, Seize 1983 Chevrolet on 7/18/91.
	15. Retn USM 285, Complt/Notc/Warrant, Seize 1988 Jaguar on 7/18/91.
	16. Retn USM 285, Complt/Notc/Warrant, Seize 1988 Jaguar on 7/18/91.
	17. Retn USM 285, Complt/Notc/Warrant, seize 1987 Suzuki on 7/18/91.
so	18. Retn USM 285, Complt/Notc/Warrant, seized property, 7/18/91.
	19. Retn USM 285, Complt/Notc/Warrant, Seize property, 7/18/91.
	20. Retn USM 285, Complt/Notc/Warrant, Seize property, 7/18/91.
	21. Retn USM 285, Complt/Notc/Warrant, Seize property, 7/18/91.
so	22. Retn USM 285, Complt/Notc/warrant, seizd vessel pursuant to seizure warrant, Biloxi MS, 7/25/91.
so	23. VERIFIED CLAIM & demand for retn of prop. claimant; Payback Mines.
	24. VERIFIED CLAIM & demand for retn of property. claimant, James Wren
	25. VERIFIED CLAIM & demand for retn of property. cliamant, Charles Arlt & Payback Mines.
	26. ANSWER & demand for jury Trial. clalimant, Payback Mines.
	27. ANSWER & demand for jury trial. claimant, Charles Arlt & Payback Mines.
	28. ANSWER & demand for Jury Trial. cliamant, James Wren.
so	29. ORD that cnsl show cause in writing, NLT 7/10/92 why this actn shluld not be dismissed or other sanctions imposed for non-compliance with local rule 6.2. M.O., C/R, P/A.
so	30. Resp to OSC by pltf.
so	31. Proof of publication 7/08/91.
jc	32. MO: tht cnsl show cause in wrtng nlt 5/18/92 why this actn shld not be dismd or other sanctions imposed for non compliance w/ LR. CR none
dr	33. Joint rpt of early meeting.

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oc 111A
ev. 1/75

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO 91-3264
USA	US Currency $405,089.23	PAGE 3 OF ___ PAGES

DATE	NR	PROCEEDINGS
6/19/92	lp	34. Note that PTC is set for 1/4/93 @ 10 am.
7/9/92	tlt	35. ORD allowing subst of atty Lydia B. Sanchez in place of Carmine J. Colucci. clmnt Charles Arlt
9-2-92	sb	36. Ntc of assctn of cnsl clm
11-30-92	ab	37. ORD subst of atty himself in pro se in place of Lydia Sanchez.
12-4-92	ab	38. Ntc of mot & mot for S/J; memo of PA; decl in Mark A. Feldman. plf.rethl 12-28-92 @ 10:00 am. LODGED PROPSD ORD & STMT OF UNCONT FACT & CONCL OF LAW (FWD TO CRD)
12-10-92	ab	39. Ntc re svc of mot for S/J; decl of Mark A. Feldman. plf.
12-15-92	ab	40. Suppl ntc re svc of mot for S/J. plf.
12-17-92	ab	41. 2ND suppl ntc of re svc of mot for S/J. plf.
12-28-92	ab	42. Ntc that the crt ord plf to srv Charles Arlt purs to the subst of atty ord ent on 11-30-92 & to re-asrv Kenneth Miller cnsl for James Wren at his last Known address; the crt further ord that clmnts opp papers must be fld & srv by 1-19-93 and that plf reply papers must br fld & srv by 1-29-93; the crt ord there would not be a hrging on the mot and that the crts ruling would be based on the papers; the crt further orded that the PTC was cont until 2-8-93
12-28-92	ab	43. NO- plf -mot for S/J; crt directs the gov to reserve the mot papers by 12-30-92 on dft. Arlt. crts sets 1-19-93 as the opp due date and 1-29-93 as the reply due date; on 1-29-93 the mot will then stand submitted w/out oral argument; crt ords the PTC of 1-4-93 to be cont to 2-8-93 @ 10:00 am. C/R- Lu Anna Waamack.
1-4-93		LODGED ltn to sender cpy of No dated 12-28-92.

Resp. App.
84 a

CERTIFICATE OF SERVICE

I, CHARLES WESLEY ARLT hereby certify that I have served a true and correct copy of the foregoing

CLAIMANTS' MOTION FOR RECONSIDERATION OF APRIL 1, 1993 ORDER GRANTING SUMMARY JUDGMENT TO PLAINTIFF, PURSUANT TO LOCAL RULE 7.16

Which is deemed filed at the time it was delivered to prison authorities for forwarding, HOUSTON V LACK, 101 L.Ed 2d 245(1988)

upon the defendant/defendants and/or his attorney/attorneys of record by placing same in a sealed, postage prepaid envelope addressed to:

U.S. ATTORNEY'S OFFICE ---------- One copy
312 North Spring Street
Los Angeles, California 90012

CLERK OF THE U.S. DISTRICT COURT
312 North Spring Street ---------- Original and One Copy
Los Angeles, California 90012

and deposited same in the United States mail at the U.S. Penitentiary, Lompoc, California on this 9th day of April 19 93

CHARLES WESLEY ARLT
26889-048
3901 Klein Blvd.
Lompoc, CA 93436

Resp. App.
85 a

APPENDIX F

CHARLES WESLEY ARLT
Reg. No. 26889-048
3901 Kline Blvd.
Lompoc, California 93436

Claimant in Pro Se

FILED
APR 22 4 02 PM '93

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. $405,089.23 U.S. CURRENCY; et al,. Defendants. CHARLES ARLT, JAMES WREN PAYBACK MINES, Claimants.	CASE NO. CV 91-3264 AWT (EEx) CLAIMANTS' REPLY TO THE PROSECUTOR'S OPPOSITIONS TO MOTION FOR RECONSIDERATION

Claimant, Charles Wesley Arlt, herein submits his reply to the plaintiff's opposition to claimant's motion for summary judgment.

MEMORANDUM OF POINTS AND AUTHORITIES

Claimants Wren and Arlt had submitted a motion for reconsideration of the court's order granting summary judgment to the government. The government oppossed the motion for reconsideration. The government opposition is wrong for the well established reason that triable issues of fact preclude summary judgment.

The government urges this court to ignore the claimant's statement of genuine issues of material facts in dispute.

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The government cites no authority whatsoever for its aggressive position that triable issues of fact can be ignored in this case. In its opposition on page 2, footnote 1, the government admits that the court docket does not reflect that the claimant's oppositions to summary judgment and claimant's statement of genuine issues of triable facts were filed or reviewed by the district court.

If claimants' oppositions to the government's motion for summary judgment (and claimant's pleadings containing statements of genuine issues of trial facts) were fully and fairly reviewed by the district court, and under "liberal construction" for pro se prisoner's pleadings, then this court would likely have complied with the case law precedents from the Supreme Court. The mere existence of a scintilla of evidence in support of the non-moving party's position is sufficient: "[T]here must be evidence on which the jury could reasonably find for the [non-moving party]." Anderson v. Liberty Lobby Inc. 106 S.Ct. 2505, 2512 (1986). See, Celotex Corp. v. Catrett, infra.

There is far more here than a "mere scintilla of evidence in support of the non-moving party's position." Claimants motion for reconsideration and statement of genuine issues of disputed facts show that there is not a single drug transaction connected to any defendant property under the "narcotic proceeds" theory. There is not a single instance of any money transaction that was not reported on 1099 IRS forms or currency transaction forms, when required, and there was never any concealment of the ownership of the funds.

However, the list of triable facts is greater and is presented in claimants' oppositions that were not fully and fairly reviewed, in the motion for reconsideration. "Summary judgment is appropriate where there are no genuine issues of material facts in dispute..." Celotex Corp. V. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552, 91 L.Ed. 2d 265 (1986).

.....

Resp. App.
87 a

Moreover, claimants' declarations, sworn under penalty of perjury, are sufficient to preclude summary judgment, as a matter of law. United States v. Lot 4, Block 5 of Eaton Acres, 904 F.2d 487, 492 (9th Cir.1990).

The government does not deny that claimant's have a great dispute as to the facts that any illegal drug act is associated with the defendant properties.

Dated: April 24, 199?

Respectfully submitted,

CHARLES WESLEY ARLT
Reg. No. 26889-048
3901 Kline Blvd.
Lompoc, California 93436

Resp. App.
88 a

CERTIFICATE OF SERVICE

I, CHARLES WESLEY ARLT hereby certify that I have served a true and correct copy of the foregoing

CLAIMANT'S REPLY TO THE PROSECUTOR'S OPPOSITION
TO MOTION FOR RECONSIDERATION.

Which is deemed filed at the time it was delivered to prison authorities for forwarding, HOUSTON V LACK, 101 L.Ed 2d 245(1988)

upon the defendant/defendants and/or his attorney/attorneys of record by placing same in a sealed, postage prepaid envelope addressed to:

CLERK OF THE U.S. DISTRICT COURT
312 NORTH SPRING STREET---------- Original and one copy
Los Angeles, California 90012

United States Attorney
Federal Building, Suite 7516 ---------- One copy
300 North Los Angeles Street
Los Angeles, California 90012

and deposited same in the United States mail at the U.S. Penitentiary, Lompoc, California on this 24 th day of April 19 93

CHARLES WESLEY ARLT
Reg. No. 26889-048
3901 Klein Blvd.
Lompoc, CA 93436

Resp. App.
89 a

NITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

APPENDIX G

CIVIL MINUTES — GENERAL

e No. CV91-3264 AWT: Date 5-11-93

e U.S.A. v. $405.089.23 U.S. CURRENCY, et al.

CKET ENTRY

ESENT:

HON. A. WALLACE TASHIMA, JUDGE

Lisa Chen
Deputy Clerk

None
Court Reporter

TORNEYS PRESENT FOR PLAINTIFFS:

None

ATTORNEYS PRESENT FOR DEFENDANTS:

None

OCEEDINGS: MINUTE ORDER (IN CHAMBERS):

DEFENDANTS' MOTION FOR RECONSIDERATION

ORDERED that the motion is DENIED.

[illegible] THAT THIS DOCUMENT WAS SERVED BY [illegible] MAIL, POSTAGE PREPAID, TO ALL COUNSEL [illegible] AT THEIR RESPECTIVE MOST RECENT ADDRESS OF [illegible] IN THIS ACTION ON THIS DATE.

DATE 5-12-93

DEPUTY CLERK

UTES FORM 11
IL—GEN

D — M

Initials of Deputy Clerk

Resp. App.
90 a

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APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES W. ARLT, JAMES ELI WREN
Appellant/Petitioner CLAIMANTS,
$405,089.23 U.S. CURRENCY, DEFENDANT

CASE NO. 93-55947

vs.

Lower Court Docket Number:
CV-91-03264
Central California

UNITED STATES OF AMERICA
Appellee/Respondent

APPELLANT'S OR PETITIONER'S INFORMAL BRIEF

1. Jurisdiction

a. Timeliness of Appeal or Petition:

(i) Date of entry of judgment or order of district court: April 1, 1993 [ER 6-8[1/]]

(ii) Date of service of any motion made after judgment (other than for fees and costs): April 9, 1993 served in prison mail.

(iii) Date of entry of order deciding motion May 11, 1993 [ER 33]

(iv) Date notice of appeal or petition filed June 15, 1993 [ER 1-2]

(v) For prisoners, date you gave notice of appeal to prison authorities June 8, 1993 [ER 3]

b. PLEASE ATTACH ONE COPY OF EACH OF THE FOLLOWING:

1. The order from which you are appealing: [ER 6-8]
2. The district court's entry of judgment: [ER 6-8]
3. The district court docket sheet: Attached to brief.

1/ ER refers to "EXCERPTS OF RECORD" and is followed by a page number where the document is found in the accompanying Excerpts of Record.

Resp. App. 91a

2. What are the facts of your case?

Claimant James Eli Wren and Charles Wesley Arlt are pro se litigants, untrained in law, and incarcerated in the maximum level United States Penitentiary at Lompoc, California for criminal convictions now on direct appeal to the United States Court of Appeals for the Ninth Circuit.

Said convictions of Wren and Arlt are based on one alleged violation of federal drug law 21 U.S.C. § 846, conspiracy to manufacture methamphetamine, and for nineteen counts of alleged 18 U.S.C. § 1956 "money laundering." Case No. CR-91-0329.

Prisoner/Claimants Wren and Arlt submit this pro se appeal brief to this Court for review de novo with the entire short record below which is incorporated by reference herein, including all motions, answers, replies, oppositions, exhibits, declarations and memorandums of Points and Authorities submitted by the pro se claimants in defense of the defendant properties herein.

Claimants request this Court for de novo review and the liberal construction standard that the United States Supreme Court applies for pro se incarcerated litigants in Haines v. Kerner, 404 U.S. 150 (1972).

On June 12, 1991 claimants Charles Wesley Arlt and James Eli Wren were indicted by the plaintiff for one count of conspiracy to aid and abet manufacturing and 19 money laundering counts.(CR-91-0329)

On June 17, 1991 the same plaintiff, upon the exact same grounds, and criminal allegations, sought forfeiture of the defendant properties herein.

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On March 27, 1992, claimants Arlt and Wren were found guilty of the indictment charges. On December 4, 1992, the plaintiff filed its motion for summary judgment, with a statement of uncontroverted facts and conclusions of law, which requested summary judgment based on the claimants' convictions for the offenses alleged in the forfeiture complaint. See Plaintiff's Statement of Uncontroverted Facts and Conclusions of Law (at ER 159: paragraphs 42, 43, 44) which state that plaintiff's ground for forfeiture is the convictions. However, claimants Arlt and Wren strongly disputed the plaintiff's conclusory fact allegations. Claimants presented their genuine issues of material facts in dispute supported with sworn declarations. ER 118-158

Althought the forfeiture complaint and judgment is based soley as punishment for the same criminal convictions, the actual issues of each defendant property seized and forfeited were never fairly and fully litigated in the criminal case on an individual basis.

The claimants' sworn declarations were not given review or contested by the plaintiff.

3. What did you ask the district court to do?

Claimants requested the court to return the defendant vehicles, money and properties because they were not illegal drug proceeds nor were the used to facilitate any illegal activity.

4. State the claims you raised at the district court.

See, pleadings below which are incorporated by reference herein.

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I.e. Claimants' opposition to plaintiff's Motion to Summary Judgment, claimant's Cross-Motions for Summary Judgment ER 52. Claimants Statement of Uncontroverted Facts and Conclusions of Law in Support of Cross-Motion for Summary Judgment ER 118-158; Claimants Motion for Reconsideration of April 1, 1993 order granting Summary Judgment to Plaintiff, pursuant to Local Rule 7.16 and Statement of Genuine Issues, ER 9-23; 29-32.

5. What issues are you raising on appeal?

ISSUES PRESENTED ON APPEAL

A. THE PRO SE CLAIMANTS INCORPORATE BY REFERENCE ALL OF THEIR PLEADINGS AND DEFENSES SUBMITTED BELOW.

B. THE JUDGMENT OF FORFEITURE MUST BE REVERSED IN LIGHT OF THE RECENT UNITED STATES SUPREME COURT RULING THAT FORFEITURE OF PROPERTIES FOR ALLEGED DRUG LAW VIOLATIONS IS A MONETARY PUNISHMENT, AND AS SUCH, IS SUBJECT TO THE LIMITATIONS OF THE EXCESSIVE FINES AND PROPORTIONALITY PRINCIPLES OF THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

C. IN THE CONTEXTS OF MULTIPLE PUNISHMENTS AND SUCCESSIVE PROSECUTION, THE DOUBLE JEOPARDY CLAUSE APPLIES TO A MONETARY PUNISHMENT IN CIVIL DRUG FORFEITURES WHENEVER THE FORFEITURE IS USED IN ANY WAY TO PUNISH THE OWNER OF THE PROPERTY.

D. THERE WAS NO JURISDICTION TO SEIZE AND FORFEIT DEFENDANT PROPERTY NOT IN THE DISTRICT.

6. Did you present all these issues to the district court.

NOT ALL. If not, why?
yes/no

Issue A was presented to the district court. Issues B and C were new decisions from the United States Supreme Court on June 29, 1993, after the district court erroneously granted

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forfeiture to plaintiff. The new Supreme Court rulings are directly on point to the issues in claimants' forfeitures.

7. What law supports these issues on appeal? (You may, but need not, refer to cases and statutes.)

In light of the facts that the plaintiff confesses that it has sought this monetary punishment of CHARLES ARLT, and JAMES ELI WREN by forfeiture of their property, and it is based on the prior conviction and punishment for the exact same offense, claimants Arlt and Wren submit that their rights under the Fifth Amendment Double Jeopardy Clause, of the United States Constitution, have been violated, and the facts and law require reversal of judgment, and return of the property.

A. All of claimants' pleadings, motions, and responses below are incorporated by reference herein for review de novo. See, ER 118-159; 9-32.

B. THE JUDGMENT OF FORFEITURE MUST BE REVERSED IN LIGHT OF THE RECENT UNITED STATES SUPREME COURT RULING THAT FORFEITURE OF PROPERTIES ALLEGED AS INSTRUMENTALITIES OF DRUG LAW VIOLATIONS IS A MONETARY PUNISHMENT, AND AS SUCH, IS SUBJECT TO THE LIMITATIONS OF THE EXCESSIVE FINES AND PROPORTIONALITY PRINCIPLES OF THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The United States Supreme Court held that civil drug forfeitures are punishment.

On June 29, 1993 the United States Supreme Court in Austin v. United States, ___U.S.___ (1993), No. 92-6073, 93 D.A.R. Daily Journal 8138 (June 29, 1993), held that the government's claim that civil drug forfeitures are merely remedial does not exclude them from review under the Excessive Fines Clause of the Eighth Amendment, so long as it can only be explained as serving in part, as punishMENT.

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"A review of English and American law before, and at the time of the Eighth Amendment, demonstrates that forfeiture generally and statutory in rem in particular historically have been understood, at least in part, as punishment". Id.

In Austin the Court declined to establish a test for determining whether a forfeiture is constitutionally "excessive," since prudence dictates that the lower courts be allowed to consider that question in the first instance. Id. Moreover, the Court held that since forfeitures (for conveyances and instrumentalities) are properly considered punishment today and that forfeiture provisions must tie the forfeiture directly to the commission of the drug offenses. Thus, even assuming that the forfeiture sections serve some remedial purpose, it cannot be concluded that forfeiture serves only that purpose. In the instant case, the plaintiff has not tied the forfeiture directly to any specific drug transaction, but rather the forfeiture of all the properties, cars and valuables is covered by a sweeping and general "conspiracy" without a single drug transaction (§841) connected to defendants..

Another important protection is the due process right to have the sentence proportional to the crime. Solem v. Helm, 463 U.S. 277 (1983)

The excessive fines clause of the Eighth Amendment may also impose limits on the state's ability to assess civil penalties in a given case. Under the California Constitution as well, civil penalties cannot exceed a defendant's ability to pay; a court may not assess a penalty that would bankrupt or render a defendant insolvent. This is clear from the discussion in Browning-Ferris Industries v. Kelco Disposal Inc., 492 U.S. 257 (1989). In that

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case, the Supreme Court considered an excessive fines challenge to punitive damages awarded in a civil action between purely private parties. The court traced the origins of the Eighth Amendment in the Magna Carta and its concern with arbitrary taxes (called "amercements") levied by the sovereign. The kind of amercement or fine with which the framers of the Eighth Amendment (and the Magna Carta) were concerned was an arbitrary or special tax that a cash-strapped sovereign might be tempted to levy against a single individual or entity and on no one else.

Given the history of the Eighth Amendment, the Browning-Ferris Court held that an award of punitive damages between purely private parties does not violate the Eighth Amendment. However, if the sovereign received a portion of the penalty, the court suggested that the Eighth Amendment would be triggered. In the instant civil forfeiture penalty case the sovereign is taking the entire list of valuable properties, against only the claimants, in an arbitrary and capricious way, and thus the Eighth Amendment is triggered.

Indeed, since prosecution are seeking civil penalties of total forfeiture under federal drug law sections are precisely the sort of case that Browning-Ferris case was not, since the sovereign is the recepient of the penalty. That fact alone brings these instant forfeiture penalties within the Excessive fines clause of the Eighth Amendment and of Article 1, Section 17 of the California Constitution.

Claimants have already been convicted and punished for the same offense that the plaintiff bases this forfeiture punishment case upon: the "drug conspiracy." Also, it does not follow that

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even if a claimant was, arguendo, in a drug conspiracy, that that conspiracy tainted every piece of property the claimants owned. If that were that case, every person in the United States with any drug offense could lose their entire estate even when it was not connected to an offense. The plaintiff's theory would cause absurd results. The plaintiff is wrong and forfeiture proceedings here are not only unfounded but unconstitutional.

Under United States v. Austin, supra, all drug forfeiture cases must now be evaluated under the Eighth Amendment Constitutional standard of proportionality and the excessive fines and penalties provisions. In the Austin case, the defendant was caught using his business and mobile home during the drug transaction, and drugs were found in the mobile home. The United States Supreme Court has ruled that forfeiture is punishment and that it must be proportional to the offense. In the instant case, there has never been any evidence that the defendant properties were ever used to facilitate any drug offense of any kind. Therefore, the instant forfeiture judgment is not only unconstitutional for being a taking without due process, it is also not proportional to one drug conspiracy offense that the claimants were convicted of in federal court. No illegal activity was ever connected to the defendant properties. The judgment for forfeiture must be vacated and set aside.

The Supreme Court in Austin held that since the penalty is paid to the Sovereign as punishment for some offense (citing Browning-Ferris Industries, v. Kelco Disposal, 492 U.S. 257, 265 (1989) and as such, is subject to the limitations of the Eighth Amendment.

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In this forfeiture, claimants were not using the properties forfeited for facilitation or conveyance of any drug business or storage. Not one single defendant property was directly or even indirectly connected to any drugs. The $537,019.16 U.S. Currency, one Bell 47 G-2 Helicopter, One Stormy Seas Four (Trowler salvage boat), One Piper Cherokee 6 Airplane, One Hundred Thirty-Eight (138) Silver Bars, and Eleven (11) Vehicles and One Small Wellcraft boat. These items seized and forfeited had nothing to do with any drug activity. No drugs were found and none are listed on the warrant returns.

The Eighth Amendment prohibition against excessive fines is violated more in this instant case than in the Austin case just reversed by the United States Supreme Court. The judgment of forfeiture in this case is extrememly excessive and not tied directly or indirectly to any drugs. The Judgment should be reversed and dismissed for violation of, inter alia, the Eighth Amendment because it is excessive, it is a penalty, and it bears no proportionality to any illegal act in the motion for summary judgment.

C. FORFEITURE JUDGMENT MUST BE REVERSED, BECAUSE IN THE CONTEXTS OF MULTIPLE PUNISHMENTS AND SUCCESSIVE PROSECUTIONS, THE DOUBLE JEOPARDY CLAUSE APPLIES TO A MONETARY PUNISHMENTS IN CIVIL DRUG FORFEITURES OF ALLEGED CONVEYANCES AND INSTRUMENTALITIES WHENEVER THE FORFEITURE IS USED IN ANY WAY TO PUNISH THE OWNER OF THE PROPERTY.

On June 29, 1993, the United States Supreme Court affirmed that the Double Jeopardy Clause of the Fifth Amendment of the

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United States Constitution prohibits a second or successive punishment for an offense for which a defendant has already been punished. See, United States v. Dixon, ___U.S.___ (1993), No. 91-1231, 93 Daily Journal D.A.R. 8205.

When a subsequent punishment is based on or incorporates the same offense already punished, it is barred by the Double Jeopardy clause. Dixon, citing North Carolina v. Pearce, 395 U.S. 711 (1969). Dixon was a drug case. In Austin v. United States, supra, the Court reaffirmed United States v. Halper, 490 U.S. 435, 188 (1988), which held that civil forfeitures penalties are monetary punishments to which the Double Jeopardy Clause can apply. Austin was a drug civil forfeiture in rem case.

"Because sanctions frequently serve more than one purpose, the fact that a forfeiture serves remedial goals will not exclude it from the Clause's purview, so long as it can be explained as serving in part to punish. See United State v. Halper, 490 U.S. 435, 448." Austin at 8138.

Although Austin was primarily a reaffirment of the Eighth Amendment, the Court clearly overruled the government tactic of labeling civil drug forfeitures as remedial and established that drug forfeitures are punishment. The court held that even assuming that drug forfeiture statutes serve some remedial purpose, that argument must fail. "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." Halper, 490 U.S. at 448. (Emhasis added by the Supreme Court in Austin).

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In the instant case the plaintiff has confessed that this forfeiture complaint is solely based on the criminal conviction in federal court and no other reason. The plaintiff's position was that there was no possible triable issue of fact because of the conviction. Every word of the plaintiff's legal theory demonstrates that this forfeiture is a successive punishment based on and incorporating the same offense for which claimants were previously punished.

The plaintiff was unable to connect the defendant properties to any illegal use themselves and simply used a blanket claim that the underlying drug conspiracy accusation conviction acted to collaterally estop the claimants from recovering these defendant properties. In light of the Supreme Court's decisions about civil drug forfeitures in Austin, supra, and double jeopardy in Dixion, the plaintiff respondent was wrong, and the judgment of forfeiture must be reversed and the properties returned to the claimants

D. THERE WAS NO JURISDICTION TO SEIZE AND FORFEIT DEFENDANT PROPERTY NOT IN THE DISTRICT.

The defendant property listed on the complaint as the "STORMY SEAS FOUR (SHRIMP BOAT) has been at all times in the Southern District of Mississippi. The district court never acquired in rem jurisdiction over the Res. ER 303 Rule C (2) of the Supplemental rules for Certain Admiralty and Maritime Claims states that the verified complaint must describe the property that is the subject of the action and state that it is within the district or will be during the pendency of the action. See also, American Bank of Wage Claims v. Registry of the District Court of Guam, 431 F.2d 1215, 1218 (9th Cir. 1970).

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Without jurisdiction, the judgment of the district court must be reversed, and the property returned to claimants.

8. Do you have any other cases pending in this court? If so, give the name and docket number of each case.

Yes, the underlying criminal conviction of CR 91-0329 is on appeal as CA 92-50467, 92-50517. The opening brief was submitted on September 16, 1993.

9. Have you filed any previous cases which have been decided by this court? If so, give the name and docket number of each case.

No Cases.

Date: September 30, 1993.

Respectfully submitted,

CHARLES WESLEY ARLT
and for Payback Mines, Inc.,

Date: September 30, 1993.

JAMES ELI WREN

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CERTIFICATE OF SERVICE

Case Name: $405,089,23 U.S. CURRENCY v. United States of America

Case No.: CV 91-3264- AWT

IMPORTANT: 2 copies of this brief and any attachments must be sent to ALL parties in this case. Please list below the names and addresses of the parties who were sent a copy of your brief and the dates on which they were served. Be sure to sign the statement below.

I certify that a copy of this brief and any attachments was served, either in person or by mail, on the persons listed below.

Signature
Notary NOT required

Name	Address	Date Served
MARK A FELDMAN AUSA	300 NORTH LOS ANGELES ST. LOS ANGELES, CALIF. 90012	9/30/93 10/1/93 (Both)

DIST.	OFF.	DOCKET YR.	DOCKET NUMBER	FILING DATE MO.	DAY	YR.	J	N/S	O	D PFT	D DEF	A 23	$ DEMAND	JUDGE/ MAG. NO.	COUNTY	JURY DEM.	DOCKET YR.	DOCKET NUMBER
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TITLE USA-V-$405089 U S CURRENCY

CAUSE CMPLT/FORFEITURE 21:881 AWT(EX)

UNITED STATES OF AMERICA,

Plaintiff,

v.

$405,089.23 U. S. CURRENCY;
$8,929.93 U. S. CURRENCY;
$123,000 U.S. CURRENCY;
ONE BELL 47 G-2 HELICOPTER,
U.S. Registration Number N59H;
STORMY SEAS FOUR (SHRIMP BOAT)
official number 2159;
ONE PIPER CHEROKEE 6 AIRPLANE;
ONE HUNDRED THIRTY-EIGHT (138)
SILVER BARS;
ONE 1985 JAGUAR,
VIN: SAJNV5842FC119348;
ONE 1981 WELLCRAFT,
VIN: HALLWELT1593G788;
ONE 1988 JAGUAR,
VIN: SAJHU164JC530324;
ONE 1986 PORSCHE,
VIN: WPOAA0940GN454897;
ONE 1988 JAGUAR,
VIN: SAJAV1643JC521364;
ONE 1986 CHEVROLET,
VIN: 1G8CS18RXG0140772;
ONE 1988 MITSUBISHI,
VIN: JA7FL24D9JP0505914;
ONE 1987 NISSAN,
VIN: JN6ND11S3HW033709;
ONE 1987 SUZUKI,
VIN: 1S4JC51C2H4154485;
ONE 1988 Jeep,
VIN: 2BCHV8157JB523469;
ONE 1988 Chevrolet,
VIN: 1GCFC24K0JZ253793;
ONE 1983 Chevrolet,
VIN: 1G8CS18B9D8132968,

Defendants.

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UNITED STATES DISTRICT COURT DOCKET

DC 111 (Rev. 7/8)

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Complt. Issd W/A.
Case maybe ref'd to Mag judge Judge Eick for discov.
Retn of USM 285 of Complt/Notc/Warrant currency seized $537,678.54, publication date 7/3/91, executed on 7/3/91.
Retn of USM 285 of Complt/Notc/Warrant currency seized $537,678.54, publication dated 7/7/91, executed on 7/3/91.
Retn of USM 285 of Complt/Notc/Warrant currency seized $537,678.54, publication date 7/3/91, executed on 7/3/91.
Retn orig warrant for arrest.
Proof of pbulication in the LA. Daily journal exc'td on 7-8-91
7. Retn USM 285, Complt/Notc/Warrant, Seize on 7/18/91 1986 Porsche.
8. Retn USM 285, Complt/Notc/Warrant, Sieze 1985 Jaguar on 7/18/91.
9. Retn USM 285, Complt/ Notc/Warrant, Seize 1988 Mitsubishi on 7/18/91.
10. Retn USM 285, Complt/Notc/Warrant, Seize 1986 Chevrolet Blazer S10 on 7/18/91.
11. Retn USM 285, Complt/Notc/Warrant, Seize 1987 Nissan on 7/18/91.
12. Retn USM 285, Complt/Notc/Warrant, Seize 1988 Jeep Comanche on 7/18/91.
13. Retn USM 285, Complt/Notc/Warrant, seize 1988 Chevrolet 2500 on 7/18/91.
14. Retn USM 285, Complt/Notc/Warrant, Seize 1983 Chevrolet on 7/18/91
15. Retn USM 285, Complt/Notc/Warrant, Seize 1988 Jaguar on 7/18/91.
16. Retn USM 285, Complt/Notc/Warrant, Seize 1988 Jaguar on 7/18/91.
17. Retn USM 285, Complt/Notc/Warrant, seize 1987 Suzuki on 7/18/91.
18. Retn USM 285, Complt/Notc/Warrant, seized property, 7/18/91.
19. Retn USM 285, Complt/Notc/Warrant, Seize property, 7/18/91.
20. Retn USM 285, Complt/Notc/Warrant, Seize property, 7/18/91.
21. Retn USM 285, Complt/Notc/Warrant, Seize property, 7/18/91.
so 22. Retn USM 285, Complt/Notc/warrant, seizd vessel pursuant to seizure warrant, Biloxi MS, 7/25/91.
so 23. VERIFIED CLAIM & demand for retn of prop. claimant; Payback Mines.
so 24. VERIFIED CLAIM & demand for retn of property. claimant, James Wren
25. VERIFIED CLAIM & demand for retn of property. cliamant, Charles Arlt & Payback Mines.
26. ANSWER & demand for jury Trial. clalimant, Payback Mines.
27. ANSWER & demand for jury trial. claimant, Charles Arlt & Payback Mines.
28. ANSWER & demand for Jury Trial. cliamant, James Wren.
so 29. ORD that cnsl show cause in writing, NLT 2/10/92 why this actn shluld not be dismissed or other sanctions imposed for non-compliance with local rule 6.2. M.O., C/R, 1/A.
so 30. Resp to OSC by pltf.
so 31. Proof of publication 7/08/91.
jc 32. MO: tht cnsl show cause in wrtng nlt 5/18/92 why this actn shld not be dismd or other sanctions imposed for non compliance w/ LR. CR none
dc 33. Joint rpt of early meeting.

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CIVIL DOCKET CONTINUATION SHEET

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		PAGE ___ OF ... PAGES

	NR	PROCEEDINGS
	ab	54. Ntc of joinder and mot to join all submission . clmnt in pro se.
		55. Decl of clmnt James Eli Wren in suppt of ntc of joinder & mot to join all submission . clmnt pro se.
	ab	56. MOt to strike erroneous portions of plfs reply to opp to mot for S/J; memo of PA. clmnt pro se.
	ab	57. Stamtement of uncontroberted facts & conclusion of law-the dft properties are forefeitable to the plf USA. (ENT 4-1-93). mldcpys.
		58. JUDGMENT- plf mot for S/J was submitted w/out oral argument; the after considering the papers fld in connection wiht the mot GR plf mot; ord that plf mot for S/J is GR and title to all of the dft properties is vested in the USA; furtner ord that clmnts shall have no further interest in the dft properties. (ENT 4-1-93) (MDJS6) mldcpys/ntc. ENTERED ON ICMS
	ab	LODGED Rtn to sender cpy of jgm fld on 3-29-93 ent on 4-1-93.
	ab	59. MOt for reconsideration of 4-1-93 ord GR S/J to plf purs to L/R 7.16.clmnt. pro se.
	kr	60. Opp to clmnts mot for recon of summ jgm; Memo of P/A..plf
93	la	61.Reply to the prosecutor's opps to mot for reconsideration. clmnt/Arlt
93	la	62.MO: dfts' mot for reconsideration is ORD DEN. (c/r n/a).
93	kr	RTN to sndr a M.O. of 5/11/93 addressed to Kenneth Miller rsn forwarding ORD exp.
-93	CH	63. DFTS & CLAIMANTS, CHARLES WESLEY ARLT, JAMES ELI WREN AND PAYBACK MINES, INC., FLD NTC OF APP TO THE 9TH CCA FRM JGM FLD 3-29-93 & ENT 4-1-93; AND FRM ORD FLD 5-11-93. FEES BILLED. $105.00 FLG & DOCKET FEES. PTY SVD: MR. CHARLES WESLEY ARLT, MR. JAMES ELI WREN: PAYBACK MINES, INC., & AUSA MARK A. FELDMAN, ESQ. ON 6-21-93.
/93	la	64.Applic & ORD for Charles Wesley Arlt as follows: DEN as to Payback Mines & Wren. GR as to individual dfts Arlt only. Let the appplic proc w/o prepymnt of cost or fees or the necissity of ginving security therefor. (re ntc of appeal)
93	la	65.NTc of desig of rcd on appeal. clmnts Arlt, Wren & Payback Mines
-93	ab	66. ORD- re appeal in form a pauperis : mot & afdt; the crt has considered the mo & the mot is DENIED.

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APPENDIX I

NO. 93-55947

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

$405,089.23 U.S. Currency,
et al,

Defendants.

CHARLES ARLT, JAMES WREN,
PAYBACK MINES,

Claimants-Appellants.

APPELLEE'S OPPOSITION BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

ISSUES PRESENTED

A. Whether the district court erred in concluding that claimant failed to raise a material issue of fact and in granting summary judgment for plaintiff.

B. Whether forfeiture of the defendant property violates the Excessive Fines Clause of the Eighth Amendment.

C. Whether forfeiture of the defendant property violates the Double Jeopardy Clause of the Fifth Amendment.

D. Whether claimants waived their right to challenge jurisdiction or venue by failing to raise either issue in a responsive pleading or pre-answer motion. If not whether the district court could exercise jurisdiction over the defendant vessel (Stormy Seas Four).

II

STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN THE COURT BELOW

This is a civil forfeiture case in which the United States of America ("the government") alleged in its Complaint for Forfeiture (Court Record 1[1]) that the defendant properties were forfeitable to the government. The government filed a motion for summary judgment on December 4, 1992 (CR 38) and claimant opposed this motion. CR 53. On April 1, 1993 the court granted the government's motion for summary judgment and entered judgment for

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[1] Hereinafter, the Court Record will be abbreviated "CR". A copy of the complete docket sheet is attached to the Excerpt of Record.

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the government. CR 58.

B. JURISDICTION AND TIMELINESS

This court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court entered its Judgment of Forfeiture on April 1, 1993. CR 58. Claimants served their motion for reconsideration on April 9, 1993, nine days after entry of judgment. (CR 59). Treating the motion as one under Rule 59, Fed.R.Civ.Pro., the filing of the motion tolled the period in which to file the notice of appeal. On May 11, 1993 the court denied claimants' motion for reconsideration. On June 15, 1993, Charles Arlt and James Wren ("claimants") timely filed their notice of appeal. CR 63.

III

PRELIMINARY STATEMENT

Claimant Charles Arlt ("Arlt") was convicted of conspiracy to manufacture methamphetamine, conspiracy to launder monetary instruments and seventeen counts of money laundering and claimant James Wren ("Wren") was convicted of conspiracy to manufacture methamphetamine, conspiracy to launder monetary instruments and thirteen counts of money laundering. Jim Hill was convicted of conspiracy to manufacture methamphetamine, conspiracy to launder monetary instruments and one count of money laundering, relating specifically to $405,089.23 that is the subject of this action. Anita Gage was convicted of conspiracy to manufacture methamphetamine. In total, Wren, Arlt and Hill were convicted of laundering over $1,630,000 from July 1990 through March 1991.

The above convictions alone were enough to establish

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probable cause to believe that the defendant properties, all of which were owned and purchased by Arlt and Wren, were the proceeds of their illegal methamphetamine activities. Moreover, the convictions also established probable cause to believe that all of the defendant properties were involved in or traceable to acts of money laundering.

Probable cause was further bolstered by the following uncontroverted facts. Arlt's company Payback Mines controlled the bank accounts that contained the $8,929.93 that is a subject of this action. The Piper Cherokee 6 airplane, Bell 47 helicopter, Stormy Seas Four shrimp boat and the eleven vehicles were purchased with $253,700 cash, within approximately thirty-five days of each other, from December 30, 1990 to February 1, 1991. Wren delivered $123,000 in cash to Millie Mayhill for safekeeping. Possession and expenditure of large amounts of cash is evidence of narcotics activity in the Ninth Circuit and many other circuits. Finally, claimants offered no evidence of any legitimate income in opposition to plaintiff's motion. Accordingly, plaintiff submits that the district court did not err in granting the government's motion for summary judgment.

IV

STATEMENT OF THE FACTS

A ARLT'S ILLEGAL METHAMPHETAMINE ORGANIZATION

1. Arlt and his associates purchased cashier's checks, transferred funds and caused the wire-transfer of monies to chemical manufacturing companies for the purchase of chemicals used in the manufacture of methamphetamine. CR 38 (Motion for

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Summary Judgment); (Appellee's Excerpt of Record at 36-38).[2]

2. Arlt and his associates made direct purchases of and ordered chemicals used in the manufacture of methamphetamine. AER at 40-52.

3. Arlt and his associates stored the chemicals in storage facilities, distributed and arranged for and took delivery of the chemicals. Id. at 36-52.

4. Arlt purchased and/or established several business entities which he used to transact business, including Highland Towing, Inc., AAA Minerals and claimant Payback Mines. Id. at 109, 115, 84, 90.

5. Arlt and his associates attempted to create the appearance that the chemicals they purchased were necessary for mining gold at several gold mines allegedly owned by Arlt in Nevada and California. No such mining operations in fact existed. CR 57 at ¶ 8 (Statement of Uncontroverted Facts and Conclusions of Law, entered on April 1, 1993).

6. Arlt, Wren and Hill were convicted on each and every count alleged against them in the Indictment. On March 27, 1992, Arlt was convicted of nineteen counts of conspiracy to aid and abet the manufacture of methamphetamine, conspiracy to launder monetary instruments and of money laundering in violation of 18 U.S.C. § 1956(a)(1), and Wren was convicted of fifteen counts of the same criminal violations. AER at 35-68, 69.

7. James Hill was convicted of conspiracy to manufacture

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[2] Hereinafter, Appellee's Excerpt of Record will be abbreviated "AER".

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methamphetamine and of laundering approximately $400,000, in violation of 18 U.S.C. § 1956(a)(1). Id. at 69. This act of laundering involved the $405,089.23 that is the first defendant listed in the caption in this case.

8. Rejecting any defenses offered by claimants in the criminal case, such as that Arlt and Wren were in the gold mining business, Arlt, Wren and Hill were convicted of laundering approximately $1,630,000 from July 1990 through March 1991.

B. TRANSACTIONS RELATED TO EACH DEFENDANT SUBJECT TO FORFEITURE

1. Defendant Properties Specifically Addressed in The Criminal Case

a. SECURITY PACIFIC BANK ACCOUNT #35-339-081, $405,089.23

9. Count 22 of the Indictment charged Hill with attempting to launder approximately $400,000. AER at 68. Hill was convicted of attempting to launder these funds. Id. at 69.

b. $123,000 IN U.S. CURRENCY

10. On March 29, 1991 a state search warrant was executed at Mayhill Bail Bonds, 400 East Rialto, San Bernardino, CA. AER at 121-22. A cardboard box containing $123,000 in U.S. currency was seized pursuant to this search warrant. Id.

11. Count 2 of the Indictment, in Paragraph 84, accused Wren of transporting $123,000 from Security Pacific to Mayhill Bail Bonds. AER at 52.

12. Wren was convicted on Count 2 of the Indictment. AER at 69.

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2. Properties Not Specifically Addressed in Criminal Case

a. 138 Silver Bars

13. On March 29, 1991 a state search warrant was executed at Mayhill Bail Bonds, 400 East Rialto, San Bernardino, CA. In addition to the above-mentioned $123,000, 138 silver bars were seized during the search. AER at 121-22.

14. An elderly female who identified herself as Millie Mayhill responded to the officers' service of the search warrant. Millie Mayhill ("Mayhill") was read her Miranda warning and she consented to a taped discussion. Id. During this taped conversation with Mayhill, Mayhill advised that her brother is Jim Wren. Id. Mayhill explained that in January 1991 Wren brought silver bars and a box into her place of business, Mayhill Bail Bonds, and placed these items in the back room, which she described as the "safe room." Id.

15. Mayhill stated that she had known "FAT CHUCK", whose real name is Charles Arlt, for three years as Arlt would come to her business to bail a lot of his people out of jail. Id.

b. BANK OF AMERICA ACCOUNT NUMBERS 01963-04647; 01969-04649; 01964-04854

16. Two accounts for Highland Towing were opened on February 20, 1991 showing the signature authority to be Arlt, Wren and Hill. AER at 118-19. Highland Towing was a business entity owned and controlled by Arlt. Id.

17. On March 28, 1991, Wren opened a third account in the name of Payback Mines, which was a business entity owned by Arlt.

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Only Jim and Regina Wren had signature authority on this account. Id. This account, no. 01964-04854, was supposed to receive the $405,089.23 that was the subject of Hill's money laundering conviction under Count 22.

c. **BELL 47 HELICOPTER -- U.S. REGISTRATION NUMBER - N 59 H**

18. On Sunday, January 20, 1991, a man who introduced himself as Wren came to Edward Mauldin's place of business, named Sundance Helicopters, to purchase a helicopter. AER at 119. After taking Wren and an associate of Wren's for a test flight, Wren agreed to purchase the helicopter for $65,000. Id. Wren presented Mr. Mauldin with $65,000 in U.S. currency, which was contained in Wren's briefcase. Id. Most of the cash was in $100 bills with some in $50 and $20 denominations. Id.

19. Wren requested that the helicopter be registered in the name of Payback Mines. Id. Wren also signed the bill of sale, signing as the vice president of Payback Mines. Id. Mr. Mauldin witnessed Wren's signature and mailed the completed bill of sale to the FAA. Id.

d. **STORMY SEAS FOUR (SHRIMP BOAT) - OFFICIAL NUMBER 2159**

21. On or around January 30, 1991, Wren purchased this boat at an auction for $51,700. AER at 119-20.

22. Wren paid for the Stormy Seas Four with $51,700 in U.S. currency contained in a briefcase. Id. Most of the bills were in small denominations. Id. While counting the money one of Wren's associates, earlier identified as his son, pulled out a

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gun and laid it on the table for an unstated reason. Id. The boat was in dry dock for repairs in Biloxi, Mississippi immediately before being seized by federal agents of the IRS. Id.

23. Claimants admit that the boat was seized pursuant to a seizure warrant issued by United States Magistrate Judge John M. Roper, Southern District of Mississippi on April 11, 1991.

e. **PIPER CHEROKEE 6 AIRPLANE**

24. On or about Sunday, December 30, 1990, Wren and Arlt came to Larry Oyers' business, named Western Cardinal, Inc., to look at a Piper Cherokee 6 airplane. AER at 120-21. On or about Monday, January 7, 1991, Oyers received a telephone call from Wren, who stated that Arlt wanted to buy the airplane on that day. Id. Wren and Oyers met at Redlands Aviation on January 7, 1991. Id. After an inspection of the airplane the two drove to Highland Towing Company. Id. After agreeing on a price of $32,000, Wren presented Oyers with a brown paper bag containing $32,000 in U.S. currency. Id. Most of the cash was in small denominations. Id.

25. Wren requested that the airplane be registered in the name of Payback Mines. Id. Oyers witnessed Wren sign the bill of sale as vice president of Payback Mines. Id.

f. **ELEVEN AUTOMOBILES AND ONE BOAT**

26. On February 1, 1991, Wren purchased eleven cars and one boat from an auction, for a total of approximately $105,000. AER at 122-23. Wren paid cash for the cars, pulling the money from a paper bag that appeared to have been buried. Id. Wren

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registered all of the cars to Payback Mines at 27110 East Third Street, the address of Highland Towing. Id.

27. Arlt was with Wren when he made the above-described purchase. Id.

28. Rick Martin, an employee of United Auto Auction, also recalled this above-described transaction with Wren and Arlt. Id. Mr. Martin said that Arlt signed the Cash Transaction Report, indicating that he was the President of Pay Back Mines. Id. Arlt had Wren sign the Department of Motor Vehicle documents for the vehicles. Id. Mr. Martin recalled that the cash used to purchase the vehicles was in twenties and hundreds, and was inside a very dirty brown paper bag. Id. Mr. Martin felt that Arlt was directing the transaction as Wren filled out some documents and a female that was with them filled out other documents. Id.

29. On or about May 2, 1991, each of the defendant properties was seized pursuant to seizure warrants. CR 38.

V

THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT FOR THE GOVERNMENT

A. STANDARD OF REVIEW

The Court reviews de novo a grant of summary judgment. United States v. 56-Foot Yacht Named Tahuna, 702 F.2d 1276 (9th Cir. 1983). However, summary judgment procedures must be judged in light of the statutory law of forfeitures. Id. at 1281.

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B. PLAINTIFF ESTABLISHED PROBABLE CAUSE AND CLAIMANT FAILED TO RAISE A MATERIAL ISSUE OF FACT AS TO A LEGITIMATE SOURCE OF INCOME

Summary.judgment is appropriate when one party sets forth uncontroverted facts sufficient for judgment and the opposing party fails to raise a material issue of fact to be resolved at trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1985). Rule 56(c), Federal Rules of Civil Procedure, provides in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings . . . on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Id. Furthermore, "[t]he mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for [the opposing party]." Liberty Lobby, Inc., 477 U.S. at 252.

The Ninth Circuit has made it clear that summary judgment in civil forfeiture cases must be analyzed in the context of the forfeiture laws.

> Summary judgment procedures under Rule 56 . . . must necessarily be construed in the light of the statutory law of forfeitures, and particularly the procedural requirements set forth therein.

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United States v. One 56 Foot Motor Yacht Named Tahuna, 702 F.2d 1276, 1281 (9th Cir. 1983); United States of America v. $5,644,540 in U. S. Currency, 799 F.2d 1357, 1361 (9th Cir. 1986). The relevant forfeiture statutes were 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A). The government submits that summary judgment was proper under both theories.

1. Defendant Properties Were Forfeitable On Narcotics "Proceeds Theory"

Title 21 section 881(a)(6) of the United States Code provides for forfeiture to the United States of all proceeds of narcotics activities or property traceable to such proceeds.[3]

a. Plaintiff's probable cause burden

The burden of proof in civil forfeiture actions is set forth in 19 U.S.C. § 1615. United States of America v. $5,644,540 in U. S. Currency, 799 F.2d 1357, 1362 (9th Cir. 1986). Section 1615 provides that to succeed in an action for forfeiture it is the plaintiff who has the initial burden. To satisfy this burden

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[3] Title 21, Section 881(a)(6) provides:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

* * *

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

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plaintiff must establish probable cause. In a civil forfeiture action under 21 U.S.C. § 881(a) the "government initially must demonstrate probable cause to believe that the property was involved in an illegal drug-related transaction." Id. at 1362; United States of America v. Dickerson, 873 F.2d 1181, 1184 (9th Cir. 1988).

Probable cause is a question of law to be decided by the court. United States of America v. $93,685.61 in U.S. Currency, 730 F.2d 571, 572 (9th Cir. 1984); United States of America v. Padilla, 888 F.2d 642, 643 (9th Cir. 1989).

It is well established that the standard for showing probable cause in a civil forfeiture case is no greater than for a search warrant. United States of America v. One 56-Foot Yacht Named the Tahuna, 702 F.2d 1276, 1281 (9th Cir. 1984). Plaintiff must show that there is more than a mere suspicion that the real property is connected to illegal drug transactions. "Probable cause is shown if the government produces 'less than prima facie proof but more than mere suspicion.'" United States of America v. $83,310.78 in U.S. Currency, 851 F.2d 1231, 1235 (9th Cir. 1988) (citation omitted).

In $83,310.78 in U.S. Currency, the court upheld a judgment of forfeiture after concluding that the "government had shown that there was more than a mere suspicion that the seized currency was connected to an illegal drug transaction." Id. at 1235 (emphasis added).

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b. Reliance upon circumstantial evidence and hearsay

To make its probable cause showing, plaintiff must offer evidence that is "adequate and sufficiently reliable to warrant the belief by a reasonable person" that the defendant properties were connected to drug transactions. United States of America v. One 56-Foot Yacht Named the Tahuna, 702 F.2d 1276, 1282 (9th Cir. 1983).

Plaintiff may make its probable cause showing by relying upon circumstantial evidence. United States of America v. $93,685.61 in U.S. Currency, 730 F.2d 571, 572 (9th Cir. 1984) cert. denied, 469 U.S. 831, 105 S.Ct. 119, 83 L.Ed.2d 61 (1984). Furthermore, such evidence need not be admissible at trial if the court deems it adequate and sufficiently reliable. United States of America v. 1982 Yukon Delta Houseboat, 774 F.2d 1432, 1434 (9th Cir. 1985).[4] "The question of probable cause depends not upon the admissibility of the evidence upon which the government relies but only upon the legal sufficiency and reliability of the evidence." Tahuna, 702 F.2d at 1283.

c. Probable cause is judged by the aggregate of facts

In deciding whether the United States has established probable cause, the Court must look to the aggregate of facts. United States v. $83,310.78 in U.S. Currency, 851 F.2d 1231 (9th Cir. 1988); United States v. $5,644,540 U.S. Currency, 799 F.2d 1362.

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[4] Accordingly, reliance on the Affidavit of Special Agent Mullins, the Indictment and Criminal Minutes, and other documentary evidence is appropriate. Id. at 1282-83.

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> Probable cause is shown if 'the aggregate of facts gives rise to more than mere suspicion that the property was exchanged for or intended to be exchanged for drugs.'

$83,310.78, 851 F.2d at 1235 (citing $5,644,540 U.S. Currency.)

In United States v. $29,959 U.S. Currency, 931 F.2d 549, 553 (9th Cir. 1991), the court held that possession of large amounts of currency is strong evidence of drug trafficking.

> Cash amounting to $29,959 is an 'extremely large amount' to be kept in the home. . . This alone is 'strong evidence that the money was furnished or intended to be furnished in return for drugs.

Similarly, the use of large amounts of cash to purchase properties is evidence of drug trafficking and that drug proceeds were used to purchase such properties. See United States v. Thomas, 913 F.2d 1111, 1115 (4th Cir. 1990).

The convictions of Arlt, Wren and Hill of conspiracy to aid and abet the manufacture of methamphetamine, conspiracy to launder monetary instruments and money laundering were sufficient for probable cause by themselves. Nevertheless, with each of the defendant properties there was additional evidence that clearly established probable cause.

First, with regard to the $405,089.23, James Hill was convicted of attempting to launder this money. This conviction, under 18 U.S.C. § 1956(a)(1), established that the defendant money was obtained from an unlawful activity, that being

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methamphetamine trafficking.

Second, Wren was convicted on Count 2 of the Indictment, which incorporates Paragraph 84, relating to the $123,000 that Wren transported to Mayhill Bail Bonds. Furthermore, the extremely large amount of currency itself bolstered the existence of probable cause.

Third, the $8,929.93 seized from three bank accounts, was also forfeitable. Two of the accounts were in the name of Highland Towing. Only Arlt, Wren and Hill had signature authority on these accounts, indicating that the money was a proceed of their methamphetamine trafficking. Furthermore, Highland Towing was a company owned by Arlt. The third account was opened in the name of Payback Mines, another company owned by Arlt. The fact that this account was also in the name of one of Arlt's companies, also supported the finding of probable cause.

Fourth, probable cause for the Bell 47 Helicopter was further supported by the fact that it was purchased with cash for $65,000. Furthermore, the aircraft was placed in the name of Arlt's business, Payback Mines.

Fifth, forfeiture of the Stormy Seas Four shrimp boat was further supported by the fact that it was purchased with $51,700 in currency. Like the helicopter, this fishing vessel was placed in the name of Arlt's business, Payback Mines.

Sixth, probable cause for the Piper 6 Cherokee Airplane was bolstered by the purchase of the aircraft with $32,000 in currency. Like the above two properties, the airplane also was placed in the name of Arlt's business, Payback Mines.

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Seventh, the eleven automobiles and one boat were purchased with $105,000 in cash at an auction. Like the above helicopter, fishing vessel and airplane, the eleven vehicles and one boat also were placed in the name of Arlt's business, Payback Mines.

For the above stated reasons, plaintiff submits that it established probable cause to believe that each of the defendant properties was forfeitable as a proceed of claimants' illegal narcotics activities, under 21 U.S.C. § 881(a)(6). Furthermore, claimants failed to offer any evidence of a legitimate source of income, such as tax returns or other business records. Accordingly, claimants failed to create a material issue of fact as to their purchase of the defendant properties with proceeds of methamphetamine transactions.

2. Defendant properties also were forfeitable on money laundering theory

Plaintiff alleged that the defendant properties were forfeitable under 18 U.S.C. § 981(a)(1). Pursuant to section 981(a)(1)(A), the government established probable cause to believe that the defendant properties were "involved in" or traceable to properties "involved in" violations of 18 U.S.C. § 1956(a)(1)(B). Accordingly, such properties were forfeitable to the government.

The defendant properties were "involved in" violations of 18 U.S.C. § 1956(a)(1)(B) or were traceable thereto because: the defendant properties were derived from a "specified unlawful activity", namely, the manufacture and sale of methamphetamine; and, the defendants were involved in financial transactions

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designed to conceal the nature, location, source, ownership, or control of the properties.

a. The Statutory Framework

Section 981(a)(1)(A) provides that any property "involved in" a violation of 18 U.S.C. § 1956, the money laundering statute, or traceable to such property, is forfeitable to the government.[5] To establish a money laundering violation, the government had to establish probable cause to believe that each property was involved in a financial transaction; each transaction involved property derived from a "specified unlawful activity", methamphetamine activities for instance; and that each transaction was designed to conceal the location, source, ownership or control of that defendant property.[6]

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[5] Section 981(a)(1)(A) provides:

> Except as provided in paragraph (2), the following property is subject to forfeiture to the United States:
>
> (A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5313(a) or 5324 of title 31, or of section 1956 or 1957 of this title, or any property traceable to such property.

[6] Title 18, section 1956(a)(1) defines money laundering as follows:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity-
>
> (B) knowing that the transaction is designed in whole or in part--
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity . . .

The term "specified unlawful activity" includes the violation of the federal narcotics laws. See 18 U.S.C. § 1956(c)(&)(A) and 18 U.S.C. § 1961(1).

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b. Defendants Were "Involved In" or Derived from Violations of Section 1956 and Therefore Are Forfeitable

The government had to establish probable cause to believe that the defendant properties were "involved in" or traceable to money laundering violations. See United States v. All Monies, 754 F. Supp. 1467, 1471 (D. Haw. 1991); United States v. Padilla, 888 F.2d 642, 643-44 (9th Cir. 1989).[7]

The government submits that claimants' convictions of numerous counts of conspiracy to manufacture methamphetamine, conspiracy to launder monetary instruments and money laundering, were sufficient to establish probable cause. Accordingly, the district court did not err in concluding that the defendant properties were involved in financial transactions, were derived from methamphetamine activities, and were designed to conceal the location, source or the ownership of the defendant properties. Below, is a brief analysis of the probable cause for each defendant.

First, with regard to the $405,089.23, James Hill was convicted of attempting to launder this money. Therefore, it was obviously involved in an "attempted" money laundering transaction

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[7] As under 21 U.S.C. § 881(a)(6), to make its probable cause showing, the government had to offer evidence that was "adequate and sufficiently reliable to warrant the belief by a reasonable person" that the defendant properties represent the proceeds of claimant's methamphetamine activities. See United States of America v. One 56-Foot Yacht Named the Tahuna, 702 F.2d 1276, 1282 (9th Cir. 1983); United States v. All Monies, 754 F. Supp. 1467, 1471 (D. Haw. 1991). The standard for establishing probable cause is more than a mere suspicion but less than a preponderance of the evidence. All Monies, 754 F. Supp. at 1471; United States v. Padilla, 888 F.2d 642, 643-44 (9th Cir. 1989).

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and was automatically forfeitable.

Second, Wren was convicted of conspiracy to commit money laundering in Count 2 of the indictment, which incorporates Paragraph 84. Paragraph 84 alleged that Wren transported $123,000 from Security Pacific Bank to Mayhill Bail Bonds. The conviction alone established probable cause.

Third, the $8,929.93 seized from three bank accounts, was also forfeitable. Two of the accounts were in the name of Highland Towing. Only Arlt, Wren and Hill had signature authority on this account, which supported the conclusion that the money was "involved in" or traceable to their methamphetamine activities. Furthermore, Highland Towing was a company owned by Arlt. The third account was opened in the name of Payback Mines, another company owned by Arlt, which also supported the conclusion that the funds were traceable to methamphetamine activities. Therefore, it also supported the finding of probable cause.

The purchase of the Bell 47 Helicopter, the Stormy Seas Shrimp boat, the Piper 6 Cherokee Airplane, and the eleven automobiles and one boat, using over $250,000 in cash and putting these properties in the name of Payback Mines, established probable cause to believe that each transaction was designed to conceal the source, ownership, and control of the properties. See United States v. Martin, 933 F.2d 609 (8th Cir. 1991) (putting property in the name of a third party evidences an intent to conceal or disguise.)

Accordingly, plaintiff submits that the court below properly

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found that probable cause was established and that the claimants failed to offer any evidence to rebut plaintiff's showing of probable cause. Therefore, claimants failed to create any material issue of fact and summary judgment for the government was proper.

VI

CLAIMANTS ARE COLLATERALLY ESTOPPED FROM DENYING THAT THEY LAUNDERED NARCOTICS PROCEEDS

Claimants' convictions collaterally estop them from arguing that they never committed acts of money laundering. United States v. $31,697.59 Cash, 665 F.2d 903 (9th Cir. 1982). Courts apply a three-step test to determine whether collateral estoppel applies. Luben Industries, Inc. v. United States, 707 F.2d 1037, (9th Cir. 1983). First, there must be a final judgment. Second, the issue decided in the prior adjudication must be the same as the one presented in the action in question. Third, the party against whom collateral estoppel is asserted must have been a party to the prior adjudication. Id.

Each of these requirements is met. Claimants' convictions without question constitute a final judgment. Robi v. Five Platters, Inc., 838 F.2d 318, 327 (9th Cir. 1988). The appeal of their convictions does not affect the finality of their convictions for purposes of collateral estoppel. Id. Thus, the judgment/convictions established that claimants were guilty of money laundering in violation of 18 U.S.C. § 1956(a)(1) and that they conspired to manufacture methamphetamine, in violation of 21 U.S.C. §§ 841(a) and 846. Furthermore, the convictions

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established that the purchase and use of chemicals by claimants was to manufacture methamphetamine rather than to facilitate a purported gold mining business.

There is no question that the laundering of over $1,600,000 of narcotics proceeds, for which the claimants were convicted, is a central issue in this forfeiture case. Obviously, claimants were party to their own criminal cases and their convictions constitute final judgments. Accordingly, the three requirements for collateral estoppel are met and claimants should be collaterally estopped from arguing that they did not launder proceeds of methamphetamine activities or that their methamphetamine operation was actually a gold mining business instead.

VII

FORFEITURE OF NARCOTICS PROCEEDS WOULD NEVER VIOLATE THE EIGHTH AMENDMENT

Relying on Austin v. United States, 113 S.Ct. 2801 (1993), claimants argue that forfeiture of the defendant properties would violate the Eighth Amendment. The burden is upon claimants to convince the Court that this forfeiture would be "excessive" under the Eighth Amendment. United States v. Certain Real Property, Commonly Known as 6250 Ledge Rd., Egg Harbor, WI, 943 F.2d 721 (7th Cir. 1991). Accord United States v. Sarbello, 985 F.2d 716, 724 (3rd Cir. 1993). Claimants cannot satisfy their burden of proof.

In Austin, the Supreme Court held that although civil in rem forfeitures may have a remedial purpose, they also serve a

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punitive purpose. Therefore, such forfeitures must be subject to the Excessive Fines Clause of the Eighth Amendment. The Court explicitly declined the opportunity to adopt a test to analyze this issue and remanded the case for a determination of whether forfeiture would violate the Eighth Amendment. Id. at 2812.

Austin is distinguishable from the instant case for one pivotal reason. The forfeiture in Austin was based on a "facilitation" theory under 21 U.S.C. §§ 881(a)(4),(7). In Austin, the government sought to forfeit an entire piece of property although only a portion of the property was used to facilitate the narcotics activity.

This appeal, however, involves only the forfeiture of "proceeds" of illegal narcotics activities under 21 U.S.C. § 881(a)(6). Even under Austin, such a forfeiture would never violate the Eighth Amendment. Austin held that the Excessive Fines Clause "prohibits only the imposition of "excessive' fines, and a fine that serves purely remedial purposes cannot be considered 'excessive' in any event. " Id. at 2812 n.14. Forfeiture of criminal proceeds[8] cannot by any stretch of imagination or logic be characterized as "punitive"; it is entirely "remedial" as it serves merely to place the non-innocent owner in the same position as if no crime had ever been committed. As such, it "cannot be considered 'excessive' in any event." Id.

Depriving a money launderer or drug dealer of his criminal

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[8] The term "criminal proceeds" or "proceeds" shall be used herein to designate both the direct proceeds of criminal activity an any property traceable to such proceeds.

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proceeds should never be considered punitive for the simple reason that "[t]he money, though in [the launderer's] possession, is not rightfully his . . . ." Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 626 (1989). Moreover, forfeiture of such proceeds does not require the drug dealer or money launderer to give up anything in which he had a lawful ownership interest. The Ninth Circuit adopted this reasoning in United States v. Feldman, 853 F.2d 648, 663 (9th Cir. 1988), cert. denied, 489 U.S. 1030 (1989).

> When the district court orders that the defendant forfeit the profits gained from illegal activity, it is hard to imagine how such a forfeiture could constitute cruel and unusual punishment. . .
>
> The jury found that Feldman had received $1,986,990 in insurance proceeds from . . . arsons. Forfeiture of that amount was not excessive.

Id. See, United States v. Porcelli, 865 F.2d 1352, 1366 (2d Cir.) cert. denied, 493 U.S. 810 (1989) ("We note, too, that the forfeiture verdict simply deprives [defendant] of the fruits of his crime . . . ."); United States v. Bucuvalas, 970 F.2d 946-48, (1st Cir. 1992) cert. denied, __ U.S. __, 113 S.Ct. 1382-83 (1993).

Similarly, the Fourth Circuit has recently held that the forfeiture of drug proceeds was remedial. United States v. Borromeo, 995 F.2d 23, 27 (4th Cir. 1993). To allow drug

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dealers to retain such "assets would frustrate a remedial purpose of the provision permitting forfeiture of the proceeds of illegal activity." Id. at 27.

Accordingly, the government submits that under no circumstances can the forfeiture of criminal proceeds violate the Eighth Amendment. Therefore, claimants have not and cannot satisfy their burden of proof on this issue.

VIII

FORFEITURE DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT

As far back as 1931 the Supreme Court recognized that double jeopardy does not apply to in rem civil forfeiture actions.

> A forfeiture proceeding under [the tax laws] is in rem. . . . The forfeiture is no part of the punishment for the criminal offense. . . . The provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply.

Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931) (citations omitted) (emphasis added).

The rule established by Various Items of Personal Property has been reaffirmed in several Supreme Court cases. In United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1983), involving the forfeiture of illegally possessed firearms, the Court held that double jeopardy is not triggered by a civil forfeiture action following an acquittal in a related criminal case.

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In Helvering v. Mitchell, 303 U.S. 391, 399 (1937), Justice Brandeis held that a civil action to enforce a tax penalty was not barred by an acquittal in a related criminal case.

> Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.

Furthermore, the court in Borromeo, supra, stated clearly that forfeiture of the proceeds of illegal activity cannot violate the Double Jeopardy Clause. Borromeo, 995 F.2d at 27.

Relying on Austin and United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892 (1989), claimants attempt to argue that forfeiture of the defendant properties would violate the Double Jeopardy Clause of the Fifth Amendment. Claimants' argument is without merit, as neither of these cases supports claimants' position. Accordingly, as with their Eighth Amendment argument, claimants cannot satisfy their burden of proof with respect to this Fifth Amendment issue.

First, Austin involved the Eighth Amendment rather than the Fifth Amendment. Second, as established above, Austin clearly should not apply to "proceeds" cases, as the forfeiture of criminal proceeds is remedial, not punitive. Applying Austin, under no circumstances should a remedial forfeiture be deemed so excessive as to be criminal. Therefore, under no circumstances should a remedial forfeiture invoke the double jeopardy clause.

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The Halper case also does not support claimant's argument. On its face Halper "creates a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused."

Under no circumstances can the forfeiture of narcotics proceeds be considered punishment. It simply deprives a drug dealer of assets not lawfully his. Therefore, based on the above Supreme Court authority, plaintiff submits that the forfeiture of narcotics proceeds cannot constitute a violation of the Double Jeopardy Clause of the Fifth Amendment. Accordingly, there should be no doubt that this in rem civil forfeiture action does not trigger the double jeopardy clause of the Fifth Amendment.

IX

CLAIMANTS WAIVED ANY JURISDICTION DEFENSE AND THE SEIZURE AND FORFEITURE WERE WITHIN THE COURT'S JURISDICTION

A. CLAIMANTS WAIVED ANY DEFENSE UNDER TERRITORIAL JURISDICTION OR VENUE

The law is abundantly clear that a party waives any defense of personal jurisdiction or venue if such defense is not initially plead or the subject of a pre-answer motion.[9] Fed.R.Civ.Pro. 12(h)(1). See Lipofsky v. New York St. Worker's Comp. Bd., 861 F.2d 1257 (11th Cir. 1988). Claimants failed to

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[9] Subject matter jurisdiction may not be waived. There is no question, however, that claimants are not challenging subject matter jurisdiction, as district courts clearly have original jurisdiction over forfeiture matters. 28 U.S.C. §§ 1345, 1355.

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assert either a jurisdiction or venue challenge, in the court below. Accordingly, claimants waived their right to assert any defect in jurisdiction or venue and the Court should not consider any arguments on these issues.

B. THE RES DID NOT NEED TO BE WITHIN THE DISTRICT FOR THE COURT TO PROPERLY EXERCISE JURISDICTION AND VENUE

Claimants appear to argue that since the defendant vessel was never brought within this venue, the lower court lacked authority to forfeit the defendant. Claimants' argument is without merit because it was not necessary to transport the vessel from Mississippi to the Central District of California under 21 U.S.C. § 881(j).

Section 881(j) provides in pertinent part:

> [A] proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

In passing this venue provision, Congress intended to eliminate the requirement that the defendant res had to be located in the judicial district where the forfeiture action was pending, during the pendency of the forfeiture action. See United States v. Accounts Nos. . ., 971 F.2d 974, 980 (3rd Cir. 1992) (the res does not need to be located in the district where the forfeiture action is pending if the forfeiture action was

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pending in the same district as the criminal prosecution).[10] Here, both the forfeiture case and the criminal case were filed in the Central District of California. Accordingly, even if the Court were to disregard claimants' waiver of these issues, claimants have failed to articulate a meaningful challenge to the jurisdiction or venue in the action below.

X

CONCLUSION

For all of the above reasons and authorities, and based upon the entire record, the judgment of the district court should be affirmed.

Dated: November 15, 1993

TERREE A. BOWERS
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
ERIC HONIG
Assistant United States Attorney
Chief, Asset Forfeiture Section

MARK A. FELDMAN
Assistant United States Attorney
Attorneys for Plaintiff-Appellee

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[10] The court in United States v. Accounts Nos. . ., raised an issue that claimants have not raised, regarding the service of process beyond the jurisdictional boundaries of the district court. Id. at 981-84. At that time statutory authority to do so did not exist. Congress has since authorized nationwide service of process in 21 U.S.C. § 1355(d).

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA Plaintiff/Appellee v. $405,089.23 U.S. Currency, et al., Defendants.	NO. 93-55947 DECLARATION OF SERVICE BY MAIL
CHARLES ARLT, JAMES WREN, PAYBACK MINES, Claimants/Appellants.	

I, Lisa Stotsenberg, declare:

That I am a citizen of the United States and a resident of Los Angeles County, California; that my business address is Federal Building, Suite 7516, 300 North Los Angeles Street, Los Angeles, California 90012; that I am over the age of 18 years, and am not a party to the above-entitled action; that on November 15, 1993, I deposited in the United States mails in the Federal Building, 300 North Los Angeles Street, Los Angeles, California, in the above-entitled action, in an envelope bearing requisite postage, a copy of:
APPELLEE'S OPPOSITION BRIEF

addressed to: See attachment.

at his/her last known address, at which place there is a delivery service by United States mail.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: November 15, 1993. Lisa Stotsenberg
LISA STOTSENBERG

Service List

1. Charles Wesly Arlt
No. 26889-048
3901 Kline Blvd.,
Lompoc, California 93436

2. James Eli Wren
No. 96377-012
3901 Kline Blvd.,
Lompoc, California 93436

EDITORIAL NOTES

References in Text. The Controlled Substances Act, referred to in subsecs. (a)(1)(B), (i)(1), is: Title II of Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1242, as amended, which is classified principally to subchapter I (section 801 et seq.) of chapter 13 of Title 21, Food and Drugs. For complete classification of this Act to the Code, see Short Title note set out under section 801 of Title 21, and Tables volume.

The Supplemental Rules for certain Admiralty and Maritime Claims, referred to in subsec. (b) in provisions preceding par. (1), are set out under Title 28, Judiciary and Judicial Procedure.

The Federal Rules of Criminal Procedure, referred to in subsec. (b)(2), are set out under this title.

Section 3 of the Anti Drug Abuse Act of 1986, referred to in subsecs. (e), (i)(1), is section 3 of Pub.L. 99–570, which is set out as a note under section 801 of Title 21.

Section 490(a)(1) of the Foreign Assistance Act of 1961, referred to in subsec. (i)(1)(C), is section 490 of Pub.L. 87–195, Pt. I, as added Pub.L. 102–583, § 5(a), Nov. 2, 1992, 106 Stat. 4924, which is classified to section 2291j(a)(1) of Title 22, Foreign Relations and Intercourse.

Codification. Amendment of subsec. (i)(1)(C) pursuant to section 102(b) of Pub.L. 103–447, which directed that "paragraph (1)(A) of" preceding "section 481(h)" be deleted, could not be executed since the language to be stricken had been deleted in the 1990 amendment pursuant to Pub.L. 101–647.

Pub.L. 103–447, § 103(a), repealed Pub.L. 102–583, § 6(a), set out in the credit. Repeal served to undo the 1992 change in text of subsec. (i)(1)(C) under Pub.L. 102–583 and return the text to subsec. (i)(1)(C) as if no change in text had ever occurred.

Amendment by section 3531 of Pub.L. 101–647 directed the placement of a period at the end of subsec. (d) of this section. A period had already been editorially placed at the end of such subsec., therefore, no further change was required.

Effective Date of 1994 Amendments. Section 330011(s)(2) of Pub.L. 103–322 provided in part that the amendment made by such section, amending directory language of section 2525(a)(2) of Pub.L. 101–647 (which amended this section), was to take effect on the date section 2525(a)(2) of Pub.L. 101–647 took effect; section 2525(a)(2) of Pub.L. 101–647 took effect on the date of enactment of Pub.L. 101–647, which was approved Nov. 29, 1990.

Effective Date of 1992 Amendments. Substitution of "section 490 of the Foreign Assistance Act of 1961" for "section 481(h) of the Foreign Assistance Act of 1961" by section 6(a) of Pub.L. 102–583 effective Oct. 1, 1992, see section 6(a) of Pub.L. 102–583, set out as a note under section 2291h of Title 22, Foreign Relations and Intercourse.

Except as otherwise provided, amendment by Pub.L. 102–550 effective Oct. 28, 1992, see section 2 of Pub.L. 102–550, set out as a note under section 5301 of Title 42, The Public Health and Welfare.

Separability of Provisions. If any provision of Pub.L. 101–73 or the application thereof to any person or circumstance is held invalid, the remainder of Pub.L. 101–73 and the application of the provision to other persons not similarly situated or to other circumstances not to be affected thereby, see section 1221 of Pub.L. 101–73, set out as a note under section 1811 of Title 12, Banks and Banking.

Severability Clause. Section 1367 of Pub.L. 99–570 provided that: "If any provision of this subtitle [Pub.L. 99–570, Title I, Subtitle H] or any amendment made by this Act [Pub.L. 99–570, Oct. 27, 1986, 100 Stat. 3207–39] or the application thereof to any person or circumstances is held invalid, the provisions of every other part, and their application, shall not be affected thereby."

§ 982. Criminal forfeiture

(a)(1) The court, in imposing sentence on a person convicted of an offense in violation of section 5313(a), 5316, or 5324 of title 31, or of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property. However, no property shall be seized or forfeited in the case of a violation of section 5313(a) of title 31 by a domestic financial institution examined by a Federal bank supervisory agency or a financial institution regulated by the Securities and Exchange Commission or a partner, director, or employee thereof.

(2) The court, in imposing sentence on a person convicted of a violation of, or a conspiracy to violate—

(A) section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of this title, affecting a financial institution, or

(B) section 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 842, 844, 1028, 1029, or 1030 of this title,

shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation.

(3) The court, in imposing a sentence on a person convicted of an offense under—

(A) section 666(a)(1) (relating to Federal program fraud);

(B) section 1001 (relating to fraud and false statements);

(C) section 1031 (relating to major fraud against the United States);

(D) section 1032 (relating to concealment of assets from conservator, receiver or liquidating agent of insured financial institution);

(E) section 1341 (relating to mail fraud); or

(F) section 1343 (relating to wire fraud),

involving the sale of assets acquired or held by the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution or any other conservator for a financial institution appointed by the Office of the

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Comptroller of the Currency or the Office of Thrift Supervision, or the National Credit Union Administration, as conservator or liquidating agent for a financial institution, shall order that the person forfeit to the United States any property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly, as a result of such violation.

(4) With respect to an offense listed in subsection (a)(3) committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations, or promises, the gross receipts of such an offense shall include any property, real or personal, tangible or intangible, which is obtained, directly or indirectly, as a result of such offense.

(5) The court, in imposing sentence on a person convicted of a violation or conspiracy to violate—

(A) section 511 (altering or removing motor vehicle identification numbers);

(B) section 553 (importing or exporting stolen motor vehicles);

(C) section 2119 (armed robbery of automobiles);

(D) section 2312 (transporting stolen motor vehicles in interstate commerce); or

(E) section 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce);

shall order that the person forfeit to the United States any property, real or personal, which represents or is traceable to the gross proceeds obtained, directly or indirectly, as a result of such violation.

(b)(1) Property subject to forfeiture under this section, any seizure and disposition thereof, and any administrative or judicial proceeding in relation thereto, shall be governed—

(A) in the case of a forfeiture under subsection (a)(1) of this section, by subsections (c) and (e) through (p) of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853); and

(B) in the case of a forfeiture under subsection (a)(2) of this section, by subsections (b), (c), (e), and (g) through (p) of section 413 of such Act.

(2) The substitution of assets provisions of subsection 413(p) shall not be used to order a defendant to forfeit assets in place of the actual property laundered where such defendant acted merely as an intermediary who handled but did not retain the property in the course of the money laundering offense unless the defendant, in committing the offense or offenses giving rise to the forfeiture, conducted three or more separate transactions involving a total of $100,000 or more in any twelve month period.

(Added Pub.L. 99-570, Title I, § 1366(a), Oct. 27, 1986, 100 Stat. 3707-39, and amended Pub.L. 100-690, Title VI, §§ 6463(c), 6464, Nov. 18, 1988, 102 Stat. 4374, 4375; Pub.L. 101-73, Title IX, § 963(c), Aug. 9, 1989, 103 Stat. 504; Pub.L. 101-647, Title XIV, §§ 1401, 1403, Title XXV, § 2525(b), Nov. 29, 1990, 104 Stat. 4835, 4874; Pub.L. 102-393, Title VI, § 638(e), Oct. 6, 1992, 106 Stat. 1788; Pub.L. 102-519, Title I, § 104(b), Oct. 25, 1992, 106 Stat. 3385; Pub.L. 102-550, Title XV, § 1512(c), Oct. 28, 1992, 106 Stat. 4058; Pub.L. 103-322, Title XXXIII, § 330011(s)(1), Sept. 13, 1994, 108 Stat. 2145.)

EDITORIAL NOTES

Effective Date of 1994 Amendments. Section 330011(s)(1) of Pub.L. 103-322 provided in part that the amendment made by such section, amending section 1401 of Pub.L. 101-647 (which amended this section), was to take effect on the date section 1401 of Pub.L. 101-647 took effect; section 1401 of Pub.L. 101-647 took effect on the date of enactment of Pub.L. 101-647, which was approved Nov. 29, 1990.

Separability of Provisions. If any provision of Pub.L. 101-73 or the application thereof to any person or circumstance is held invalid, the remainder of Pub.L. 101-73 and the application of the provision to other persons not similarly situated or to other circumstances not to be affected thereby, see section 1221 of Pub.L. 101-73, set out as a note under section 1811 of Title 12, Banks and Banking.

Severability Clause. See note set out under section 981 of this title.

§ 984. Civil forfeiture of fungible property

(a) This section shall apply to any action for forfeiture brought by the Government in connection with any offense under section 1956, 1957, or 1960 of this title or section 5322 or 5324 of title 31, United States Code.

(b)(1) In any forfeiture action in rem in which the subject property is cash, monetary instruments in bearer form, funds deposited in an account in a financial institution (as defined in section 20 of this title), or other fungible property—

(A) it shall not be necessary for the Government to identify the specific property involved in the offense that is the basis for the forfeiture; and

(B) it shall not be a defense that the property involved in such an offense has been removed and replaced by identical property.

(2) Except as provided in subsection (c), any identical property found in the same place or account as the property involved in the offense that is the basis for the forfeiture shall be subject to forfeiture under this section.

(c) No action pursuant to this section to forfeit property not traceable directly to the offense that is the basis for the forfeiture may be commenced more than 1 year from the date of the offense.

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beginning after the date of enactment of this Act [Sept. 13, 1994]."

Effective Date of 1987 Amendment. Amendment by Pub.L. 100-182 applicable with respect to offenses committed after enactment of Pub.L. 100-182, which was approved Dec. 7, 1987, see section 26 of Pub.L. 100-182, set out as a note under section 3006A of this title.

Effective Date of 1986 Amendment. Section 8(c) of Pub.L. 99-646 provided that: "The amendments made by this section [amending subsec. (a) of this section and section 3663 of this title] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [this section]."

Section 9(b) of Pub.L. 99-646 provided that: "The amendments made by this section [subsec. (b) of this section] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [this section]."

Section 80(b) of Pub.L. 99-646 provided that: "The amendments made by this section [amending subsec. (d) of this section] shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984 [see Effective Date note below]."

Section 81(b) of Pub.L. 99-646 provided that: "—The amendments made by this section [amending subsec. (a) of this section] shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984 [see Effective Date note below]."

Section 1007(b) of Pub.L. 99-570 provided that: "(b) The amendment made by this section [enacting subsec. (d) of this section] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [this section]."

Effective Date. Section effective on the first day of first calendar month beginning thirty six months after Oct. 12, 1984, applicable only to offenses committed after taking effect of sections 211 to 239 of Pub.L. 98-473, and except as otherwise provided for therein, see section 235 of Pub.L. 98-473, as amended, set out as a note under section 3551 of this title.

Authority to Lower Sentences Below Statutory Minimum for Old Offenses. Section 24 of Pub.L. 100-182 provided that: "Notwithstanding section 235 of the Comprehensive Crime Control Act of 1984 [section 235 of Pub.L. 98-473, set out as a note under section 3551 of this title]—

"(1) section 3553(e) of title 18, United States Code [subsec. (e) of this section];

"(2) rule 35(b) of the Federal Rules of Criminal Procedure as amended by section 215(b) of such Act; and

"(3) rule 35(b) as in effect before the taking effect of the initial set of guidelines promulgated by the United States Sentencing Commission pursuant to chapter 58 of title 28, United States Code [sections 991 et seq. of Title 28, Judiciary and Judicial Procedure],

shall apply in the case of an offense committed before the taking effect of such guidelines."

§ 3554. Order of criminal forfeiture

The court, in imposing a sentence on a defendant who has been found guilty of an offense described in section 1962 of this title or in title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 shall order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant forfeit property to the United States in accordance with the provisions of section 1963 of this title or section 413 of the Comprehensive Drug Abuse and Control Act of 1970.

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1990.)

Editorial Notes

References in Text. Title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970, referred to in text, are Titles II and III of Pub.L. 91-513, Oct. 27, 1970, 84 Stat. 1242, which are principally classified to subchapters I and II of chapter 13 of Title 21, Food and Drugs.

Section 413 of such Act, referred to in text, is section 413 of Pub.L. 91-513, added Pub.L. 98-473, Title II, c. III, part B, § 303, Oct. 12, 1984, 98 Stat. 2044, which is classified to section 853 of Title 21.

Effective Date. Section effective on the first day of first calendar month beginning thirty six months after Oct. 12, 1984, applicable only to offenses committed after taking effect of sections 211 to 239 of Pub.L. 98-473, and except as otherwise provided for therein, see section 235 of Pub.L. 98-473, as amended, set out as a note under section 3551 of this title.

§ 3555. Order of notice to victims

The court, in imposing a sentence on a defendant who has been found guilty of an offense involving fraud or other intentionally deceptive practices, may order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant give reasonable notice and explanation of the conviction, in such form as the court may approve, to the victims of the offense. The notice may be ordered to be given by mail, by advertising in designated areas or through designated media, or by other appropriate means. In determining whether to require the defendant to give such notice, the court shall consider the factors set forth in section 3553(a) to the extent that they are applicable and shall consider the cost involved in giving the notice as it relates to the loss caused by the offense, and shall not require the defendant to bear the costs of notice in excess of $20,000.

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1991.)

Editorial Notes

Effective Date. Section effective on the first day of first calendar month beginning thirty six months after Oct. 12, 1984, applicable only to offenses committed after taking effect of sections 211 to 239 of Pub.L. 98-473, and except as otherwise provided for therein, see section 235 of Pub.L. 98-473, as amended, set out as a note under section 3551 of this title.

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cation, or rehabilitation as alternatives to conviction or criminal penalty for offenses involving any drug or other substance subject to control under any such treaty or agreement.

(Pub. L. 91-513, Title II, § 412, as added Pub. L. 95-633, Title I, § 107(a), Nov. 10, 1978, 92 Stat. 3773.)

§ 853. Criminal forfeitures

Property subject to criminal forfeiture

(a) Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

Meaning of term "property"

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

Third party transfers

(c) All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

Rebuttable presumption

(d) There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that—

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

Protective orders

(e)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

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(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

Warrant of seizure

(f) The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

Execution

(g) Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

Disposition of property

(h) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

Authority of the Attorney General

(i) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

Applicability of civil forfeiture provisions

(j) Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.

Bar on intervention

(k) Except as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may—

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(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this subchapter; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

Jurisdiction to enter orders

(l) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

Depositions

(m) In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

Third party interests

(n)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

Construction

(o) The provisions of this section shall be liberally construed to effectuate its remedial purposes.

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Forfeiture of substitute property

(p) If any of the property described in subsection (a) of this section, as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

(Pub.L. 91–513, Title II, § 413, as added Pub.L. 98–473, Title II, § 303, Oct. 12, 1984, 98 Stat. 2044, and amended Pub.L. 98–473, Title II, § 2301(d)–(f), Oct. 12, 1984, 98 Stat. 2192, 2193; Pub.L. 99–570, Title I, §§ 1153(b), 1864, Oct. 27, 1986, 100 Stat. 3207–13, 3207–54.)

Editorial Notes

Codification. The language of section 1153(b) of Pub.L. 99–570, amending this section by the relettering of subsec. (p) as (q) and addition of a new subsec. (p) was executed by the addition of a new subsec. (p), but no relettering of prior subsec. (p) since such prior subsec. (p) had been relettered (o) by Pub.L. 98–473, Title II, § 2301(e)(2), Oct. 12, 1984, 98 Stat. 2193.

Amendment by section 1153(b) of Pub.L. 99–570 was executed to section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (this section) as the probable intent of Congress, despite directory language purporting to require the amendment of section 413 of title II of the "Comprehensive Drug Abuse Prevention and Control Act of 1975".

The amendatory language of section 1864(1) of Pub.L. 99–570, directing the substitution of "subsection (n)" for "subsection (o)" in the second subsection (h) [originally enacted as (*l*) and relettered (h) by section 2301(e)(2) of Pub.L. 98–473] was executed to such relettered subsec. (h) which was subsequently relettered as (k) by section 1864(4) of Pub.L. 99–570.

The amendatory language of section 1864(3) of Pub.L. 99–570 directing the substitution of "this subchapter" for "this chapter" in subsec. (i)(1) was executed by the substitution of "this subchapter" for "this section" as the probable intent of Congress.

§ 853a. Transferred to § 862

§ 854. Investment of illicit drug profits

Prohibition

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year in which such person has participated as a principal within the meaning of section 2 of Title 18 to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this section if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any violation of this subchapter or subchapter II of this chapter after such purchase do not amount in the aggregate to 1 per centum of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

Penalty

(b) Whoever violates this section shall be fined not more than $50,000 or imprisoned not more than ten years, or both.

"Enterprise" defined

(c) As used in this section, the term "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

Construction

(d) The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(Pub. L. 91–513, Title II, § 414, as added Pub. L. 98–473, Title II, § 303, Oct. 12, 1984, 98 Stat. 2049.)

§ 855. Alternative fine

In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(Pub. L. 91–513, Title II, § 415, as added Pub. L. 98–473, Title II, § 2302, Oct. 12, 1984, 98 Stat. 2193.)

§ 856. Establishment of manufacturing operations

(a) Except as authorized by this title, it shall be unlawful to—

(1) knowingly open or maintain any place for the purpose of manufacturing, distributing, or using any controlled substance;

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APPENDIX K

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

June 1994 Grand Jury

UNITED STATES OF AMERICA, Plaintiff, v. CHARLES WESLEY ARLT, Defendant.	CR 91-329(B)-DT S E C O N D S U P E R S E D I N G I N D I C T M E N T [21 U.S.C. §§ 846, 841(a)(1): Conspiracy to Aid and Abet the Manufacture of Methamphetamine; 18 U.S.C. § 371: Conspiracy to Launder Monetary Instruments; 18 U.S.C. § 1956(a): Laundering of Monetary Instruments; 18 U.S.C. § 2: Aiding and Abetting and Causing an Act to be Done; 21 U.S.C. § 853: Criminal Forfeiture]

The Grand Jury charges:

JWJ.jwj

COUNT ONE

[21 U.S.C. §§ 846, 841(a)(1); 18 U.S.C. § 2; 21 U.S.C. § 853]

I. OBJECTS OF THE CONSPIRACY

Beginning on a date unknown to the Grand Jury and continuing to on or about March 29, 1991, within the Central District of California and elsewhere, defendant CHARLES WESLEY ARLT and coconspirators Anita Gage, James Eli Wren, Daryle Eugene House, Deanna Marie Pierce, James Rocky Hill, Robert Kuhnle (hereinafter collectively referenced as the "identified coconspirators"), and others both known and unknown to the Grand Jury, knowingly and intentionally conspired and agreed with each other to commit the following offenses against the United States:

1. To knowingly and intentionally aid and abet the manufacture of 1 kilogram or more of a substance or mixture containing a detectable amount of methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 846, and Title 18, United States Code, Section 2.

2. To knowingly and intentionally manufacture 1 kilogram or more of a substance or mixture containing a detectable amount of methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

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II. MEANS BY WHICH THE OBJECTS OF THE CONSPIRACY WERE TO BE ACCOMPLISHED

The objects of the conspiracy were to be accomplished in substance as follows:

1. Defendant Arlt and the identified coconspirators supplied chemicals used in the manufacture of methamphetamine, including hydriodic acid and red phosphorous, to other coconspirators, who in turn manufactured methamphetamine. Defendant CHARLES WESLEY ARLT and coconspirator James Eli Wren wire transferred the funds necessary to purchase hydriodic acid from banks within the Central District of California to bank accounts in Texas controlled by coconspirator Deanna Marie Pierce. Defendant CHARLES WESLEY ARLT and coconspirator Anita Gage also transported United States currency to the Texas banks. Defendant CHARLES WESLEY ARLT and coconspirator Deanna Marie Pierce deposited the currency into the Texas bank accounts controlled by coconspirator Deanna Marie Pierce.

2. Coconspirator Deanna Marie Pierce and another coconspirator established a company called AAA Minerals Company (hereinafter "AAA Minerals"). Coconspirator Deanna Marie Pierce thereafter ordered hydriodic acid from Calabrian International, Inc. (hereinafter "Calabrian"), a chemical manufacturing and distribution company, on behalf of AAA Minerals. Coconspirator Deanna Marie Pierce wire transferred the funds for the hydriodic acid purchases from the Texas bank accounts that she controlled to Calabrian, and requested shipment either to a warehouse facility in Texas or to warehouse facilities within the Central District of California. All of the hydriodic acid solution

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ultimately was to be transported to San Bernardino County, California.

3. Defendant CHARLES WESLEY ARLT, coconspirators James Eli Wren, Robert Kuhnle, and another coconspirator accepted delivery of the hydriodic acid in San Bernardino County, California. Defendant CHARLES WESLEY ARLT, coconspirators James Eli Wren, Robert Kuhnle, and another coconspirator then transported the hydriodic acid to Highland Towing Company (hereinafter "Highland Towing"), a towing business owned by defendant CHARLES WESLEY ARLT, located in Highland, California. While at Highland Towing, unknown individuals scraped the labels and stencils that identified the contents of the drums as hydriodic acid from the drums in order to avoid detection by law enforcement.

4. Coconspirators Robert Kuhnle and James Eli Wren transported hydriodic acid from Highland Towing to Anita Gage and others, who took possession of the hydriodic acid. The hydriodic acid was to be used to manufacture methamphetamine.

5. Coconspirator Anita Gage located individuals to purchase the hydriodic acid, and distributed the hydriodic acid to those individuals. Those individuals then manufactured and attempted to manufacture methamphetamine with the hydriodic acid. Coconspirator Anita Gage accepted United States currency and methamphetamine in exchange for the hydriodic acid, and in turn sold the methamphetamine for United States currency.

6. Defendant CHARLES WESLEY ARLT and coconspirator Daryle Eugene House purchased and took delivery of red phosphorous, a chemical used to manufacture methamphetamine. Defendant CHARLES WESLEY ARLT and coconspirator Daryle Eugene House further

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distributed the red phosphorous to individuals who manufactured or intended to manufacture methamphetamine with it.

7. Coconspirator James Rocky Hill arranged for the delivery of hydriodic acid and red phosphorous to other coconspirators, provided security to the coconspirators, and took custody of monies generated by and for the conspiracy.

8. Defendant CHARLES WESLEY ARLT and coconspirators James Eli Wren, James Rocky Hill, and Regina Wren used some of the monies generated by the conspiracy to purchase items in order to corroborate their cover story that they were in the mining business and to conceal the narcotics proceeds.

III. OVERT ACTS

In furtherance of the conspiracy and to accomplish the objects of the conspiracy, defendant CHARLES WESLEY ARLT, the identified coconspirators, and others committed various overt acts within the Central District of California and elsewhere, including but not limited to the following:

1. On or about January 17, 1989, defendant CHARLES WESLEY ARLT purchased approximately 10 pounds of red phosphorous, a chemical used in the production of methamphetamine, from Chem Lab Supplies, Placentia, California.

2. On or about October 26, 1989, defendant CHARLES WESLEY ARLT purchased approximately 13 pounds of lidocaine, a chemical used to dilute or "cut" methamphetamine, from Chem Lab Supplies, Placentia, California.

3. On or about November 1, 1989, defendant CHARLES WESLEY ARLT purchased approximately 10 gallons of hydriodic acid and

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other chemicals and apparatus used in the production of methamphetamine from Chem Lab Supplies, Placentia, California.

4. In or about December 1989, defendant CHARLES WESLEY ARLT and another coconspirator purchased hydrochloric acid and four pumps at Chem Lab Supplies, Placentia, California. 5. On or about January 25, 1990, defendant CHARLES WESLEY ARLT purchased approximately 10 pounds of red phosphorous, a chemical used in the production of methamphetamine, from Chem Lab Supplies, Placentia, California.

6. On or about February 2, 1990, another coconspirator ordered approximately 2,800 pounds of hydriodic acid solution costing approximately $23,800, from Calabrian, to be available for customer pick up in Texas on or about February 12, 1990. This order was later changed to 4,000 pounds of hydriodic acid solution, costing approximately $33,000.

7. In or about February 1990, coconspirator Anita Gage carried approximately $30,000 in United States currency from the Central District of California to Texas, to be used for the purchase of hydriodic acid solution.

8. On or about February 9, 1990, coconspirator Deanna Marie Pierce purchased a cashier's check with United States currency at Texas Commerce Bank in the amount of $33,000, made payable to Calabrian.

9. In or about February 1990, defendant CHARLES WESLEY ARLT and coconspirator Anita Gage travelled from the Central District of California to Texas, for the purpose of taking delivery of hydriodic acid solution.

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10. On or about February 12, 1990, defendant CHARLES WESLEY ARLT picked up approximately 4,000 pounds of hydriodic acid solution from Calabrian's facility in Port Neches, Texas.

11. On or about February 15, 1990, coconspirator Deanna Marie Pierce ordered approximately 4,000 pounds of hydriodic acid solution costing approximately $33,000 plus shipping, from Calabrian, to be delivered on or about February 22, 1990 to a warehouse facility located at 209 South Friendswood Drive, Friendswood, Texas.

12. On or about February 20, 1990, coconspirator Deanna Marie Pierce purchased a cashier's check with United States currency at Texas Commerce Bank in the amount of $33,157.62, made payable to Calabrian.

13. On or about February 22, 1990, at a warehouse facility at 209 South Friendswood Drive, Friendswood, Texas, defendant CHARLES WESLEY ARLT took delivery of approximately 4,000 pounds (eight 55-gallon drums) of hydriodic acid solution which had been shipped from Calabrian.

14. On or about February 23, 1990, coconspirator Deanna Marie Pierce ordered approximately 4,000 pounds of hydriodic acid solution costing approximately $33,000 plus shipping, from Calabrian, to be delivered on or about March 12, 1990 to a warehouse facility located at 209 South Friendswood Drive, Friendswood, Texas.

15. On or about March 14, 1990, coconspirator Deanna Marie Pierce wire transferred approximately $33,000 from Community National Bank in Friendswood, Texas, to Calabrian's bank account at National Westminster Bank, New Jersey.

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16. In or about April, 1990, defendant CHARLES WESLEY ARLT and coconspirator James Eli Wren purchased and took delivery of approximately 500 pounds of red phosphorous from Great Lakes Chemical Company, Melrose Park, Illinois.

17. On or about April 16, 1990, coconspirator Deanna Marie Pierce ordered approximately 8,000 pounds of hydriodic acid solution costing approximately $66,000, from Calabrian, to be picked up during the week of April 23, 1990. This order was later changed to authorize delivery via common carrier on or about May 8, 1990 to a warehouse facility located at 209 South Friendswood Drive, Friendswood, Texas.

18. On or about May 2, 1990, defendant CHARLES WESLEY ARLT deposited approximately $65,770 in United States currency into a bank account at Community National Bank, Friendswood, Texas.

19. On or about May 2, 1990, defendant CHARLES WESLEY ARLT wire transferred approximately $65,760 from Community National Bank, Friendswood, Texas, to Calabrian's bank account at National Westminster Bank, New Jersey.

20. On or about May 9, 1990, coconspirator Deanna Marie Pierce caused the delivery of approximately 8,000 pounds of hydriodic acid solution to a warehouse facility located at 209 South Friendswood Drive, Friendswood, Texas.

21. On or about June 26, 1990, defendant CHARLES WESLEY ARLT purchased a cashier's check with United States currency at the Bank of San Bernardino, San Bernardino, California, in the amount of $35,000, made payable to AAA Minerals, with the purchaser listed as "OMNI MINING -- C.W. ARLT."

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22. On or about June 28, 1990, coconspirator Deanna Marie Pierce ordered approximately 4,000 pounds of hydriodic acid solution costing approximately $33,000, from Calabrian, to be delivered on or about July 5, 1990 to a warehouse facility located at 424-A East Rialto Avenue, San Bernardino, California.

23. On or about June 28, 1990, coconspirator Deanna Marie Pierce caused a cashier's check in the amount of $35,000, with the purchaser listed as "OMNI MINING -- C.W. ARLT," to be delivered to Calabrian, in payment for 4,000 pounds of hydriodic acid.

24. On or about July 7, 1990, at the Consolidated Freightways terminal in San Bernardino County, California, defendant CHARLES WESLEY ARLT took delivery of approximately 4,000 pounds (eight 55-gallon drums) of hydriodic acid solution which had been shipped from Calabrian to AAA Minerals.

25. On or about July 16, 1990, coconspirator Deanna Marie Pierce ordered approximately 4,800 pounds of hydriodic acid solution costing approximately $34,080, from Calabrian, to be delivered on or about July 21, 1990 to a warehouse facility located at 424-A East Rialto Avenue, San Bernardino, California.

26. On or about July 16, 1990, defendant CHARLES WESLEY ARLT wire transferred approximately $45,000 from Bank of San Bernardino, San Bernardino, California to a bank account at Texas Commerce Bank controlled by coconspirator Deanna Marie Pierce.

27. On or about July 16, 1990, Deanna Marie Pierce wire transferred approximately $34,637 from a bank account at Texas

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Commerce Bank to Calabrian's bank account at National Westminster Bank, New Jersey.

28. On or about July 25, 1990, at the Consolidated Freightways terminal in San Bernardino County, California, coconspirator James Eli Wren took delivery of approximately 4,800 pounds (eight 55-gallon drums) of hydriodic acid solution which had been shipped from Calabrian to AAA Minerals.

29. On or about August 1, 1990, coconspirator Deanna Marie Pierce ordered approximately 4,800 pounds of hydriodic acid solution costing approximately $34,080 plus shipping from Calabrian, to be ready for delivery on or about August 8, 1990 to a warehouse facility located at 424-A East Rialto Avenue, San Bernardino, California.

30. On or about August 1, 1990, defendant CHARLES WESLEY ARLT deposited approximately $39,007 in United States currency into a bank account at the Bank of San Bernardino.

31. On or about August 1, 1990, defendant CHARLES WESLEY ARLT wire transferred approximately $35,000 from the Bank of San Bernardino to a bank account at the First Bank of Deerpark, Texas, controlled by coconspirator Deanna Marie Pierce.

32. On or about August 2, 1990, coconspirator Deanna Marie Pierce wire transferred approximately $34,637 from the First Bank of Deerpark to Calabrian's bank account at National Westminster Bank, New Jersey.

33. On or about August 8, 1990, defendant CHARLES WESLEY ARLT purchased Highland Towing Company, 27110 East Third Street, San Bernardino, California.

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34. On or about August 10, 1990, coconspirator James Eli Wren rented unit A-19 at a warehouse facility located at 1180 East Ninth Street, San Bernardino, California.

35. On or about August 21, 1990, defendant CHARLES WESLEY ARLT ordered 700 pounds of red phosphorous costing $2,975, from Great Lakes Chemical Company, Melrose Park, Illinois.

36. On or about August 21, 1990, coconspirator James Eli Wren deposited $10,605 in United States currency into a bank account at the Bank of San Bernardino.

37. On or about August 21, 1990, coconspirator James Eli Wren wire transferred approximately $2,975 from a bank account at the Bank of San Bernardino to Great Lakes Chemical Company's bank account in Melrose Park, Illinois.

38. On or about August 27, 1990, coconspirator Deanna Marie Pierce ordered approximately 9,600 pounds of hydriodic acid solution costing approximately $67,200 plus shipping from Calabrian, to be delivered on or about September 5, 1990 to a warehouse facility located at 424-A East Rialto Avenue, San Bernardino, California.

39. On or about August 27, 1990, coconspirator James Eli Wren deposited approximately $71,000 in United States currency into a bank account at the Bank of San Bernardino.

40. On or about August 27, 1990, coconspirator James Eli Wren wire transferred approximately $71,000 from a bank account at the Bank of San Bernardino to a bank account at the First Bank of Deerpark controlled by coconspirator Deanna Marie Pierce.

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41. On or about August 27, 1990, coconspirator Deanna Marie Pierce wire transferred approximately $68,315 from the First Bank of Deerpark to Calabrian's bank account at National Westminster Bank, New Jersey.

42. On or about August 30, 1990, defendant CHARLES WESLEY ARLT took delivery of approximately 700 pounds of red phosphorous at a warehouse facility located at 422-A East Rialto Avenue, San Bernardino, California.

43. On or about September 8, 1990, at the Consolidated Freightways terminal in San Bernardino County, California, coconspirator James Eli Wren took delivery of approximately 9,600 pounds (sixteen 55-gallon drums) of hydriodic acid solution which had been shipped from Calabrian to AAA Minerals.

44. On or about September 14, 1990, defendant CHARLES WESLEY ARLT purchased, with $130,000 in United States currency, a 160-acre parcel of property in Osceola, Nevada, commonly known as the Old Marriott Ranch.

45. On or about October 8, 1990, coconspirator Deanna Marie Pierce ordered approximately 5,216 pounds of hydriodic acid solution costing approximately $37,503.04, from Calabrian, to be delivered on or about October 15, 1990 to a warehouse facility located at 424-A East Rialto Avenue, San Bernardino, California.

46. On or about October 10, 1990, coconspirator James Eli Wren deposited $42,600 in United States currency into a bank account at the Bank of San Bernardino.

47. On or about October 10, 1990, coconspirator James Eli Wren wire transferred approximately $38,000 from the Bank of San

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Bernardino to a bank account at the First Bank of Deerpark controlled by coconspirator Deanna Marie Pierce.

48. On or about October 10, 1990, coconspirator Deanna Marie Pierce wire transferred approximately $36,021 from the First Bank of Deerpark to Calabrian's bank account at National Westminster Bank, New Jersey.

49. On or about October 15, 1990, at the Consolidated Freightways terminal in San Bernardino County, California, coconspirator James Eli Wren took delivery of approximately 5,216 pounds (eight 55-gallon drums) of hydriodic acid solution which had been shipped from Calabrian to AAA Minerals.

50. On or about November 5, 1990, coconspirator Deanna Marie Pierce ordered approximately 5,216 pounds of hydriodic acid solution costing approximately $37,503.04, from Calabrian, to be delivered on or about November 12, 1990 to a warehouse facility located at 424-A East Rialto Avenue, San Bernardino, California.

51. On or about November 5, 1990, coconspirator James Eli Wren deposited approximately $40,000 in United States currency into a bank account at the Bank of San Bernardino.

52. On or about November 5, 1990, coconspirator James Eli Wren wire transferred approximately $40,000 to a bank account at the First Bank of Deerpark controlled by coconspirator Deanna Marie Pierce.

53. On or about November 5, 1990, coconspirator Deanna Marie Pierce wire transferred approximately $36,981 from the First Bank of Deerpark to Calabrian's bank account at National Westminster Bank, New Jersey.

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54. On or about November 11, 1990, at the Consolidated Freightways terminal in San Bernardino County, California, defendant CHARLES WESLEY ARLT took delivery of approximately 5,216 pounds (eight 55-gallon drums) of hydriodic acid solution which had been shipped from Calabrian to AAA Minerals.

55. On or about November 8, 1990, coconspirator James Eli Wren purchased a cashier's check with United States currency in the amount of $200,000, made payable to defendant CHARLES WESLEY ARLT.

56. On or about November 9, 1990, defendant CHARLES WESLEY ARLT endorsed a $200,000 cashier's check and delivered it to Unibank, New York, depositing the funds into a bank account there.

57. On or about November 9, 1990, defendant CHARLES WESLEY ARLT instructed Unibank, New York, to forward $200,000 to a bank account at Unibank, Luxembourg controlled by defendant CHARLES WESLEY ARLT and two other coconspirators.

58. On or about November 27, 1990, another coconspirator deposited $47,069 in United States currency into a bank account at the Bank of San Bernardino.

59. On or about November 27, 1990, another coconspirator wire transferred approximately $40,000 from the Bank of San Bernardino to a bank account at the First Bank of Deerpark controlled by coconspirator Deanna Marie Pierce.

60. On or about November 28, 1990, coconspirator Deanna Marie Pierce ordered approximately 5,216 pounds of hydriodic acid solution costing approximately $36,981, from Calabrian, to

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be delivered "as soon as possible" to a warehouse facility located at 424-A East Rialto Avenue, San Bernardino, California.

61. On or about November 28, 1990, coconspirator Deanna Marie Pierce wire transferred approximately $36,981 from the First Bank of Deerpark to Calabrian's bank account at National Westminster Bank, New Jersey.

62. On or about November 29, 1990, coconspirator Deanna Marie Pierce ordered approximately 5,216 pounds of hydriodic acid solution costing approximately $37,503, from Calabrian, to be delivered on or about December 3, 1990, to a warehouse facility located at 424-A East Rialto Avenue, San Bernardino, California.

63. On or about December 2, 1990, coconspirator James Eli Wren rented unit A-10 at a warehouse facility located at 1180 East Ninth Street, San Bernardino, California.

64. On or about December 3, 1990, at the Consolidated Freightways terminal in San Bernardino County, California, coconspirator Robert Kuhnle took delivery of approximately 5,216 pounds (eight 55-gallon drums) of hydriodic acid solution which had been shipped from Calabrian to AAA Minerals.

65. On or about December 3, 1990, defendant CHARLES WESLEY ARLT purchased the following ammunition at a sporting goods store in Ely, Nevada: two boxes of .38 caliber ammunition, four boxes of .44 magnum ammunition, two boxes of .30 caliber carbine ammunition, four boxes of shotgun shells, and two boxes of .380 ammunition.

66. On or about December 14, 1990, coconspirator Deanna Marie Pierce changed her order of November 29, 1990 with

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Calabrian from 5,216 pounds to approximately 10,432 pounds of hydriodic acid solution costing approximately $73,962, to be shipped to a warehouse facility located at 424-A East Rialto Avenue, San Bernardino, California.

67. On or about December 14, 1990, coconspirator James Eli Wren wire transferred approximately $80,000 from the Bank of San Bernardino to a bank account at the First Bank of Deerpark controlled by coconspirator Deanna Marie Pierce.

68. On or about December 14, 1990, coconspirator Deanna Marie Pierce wire transferred approximately $73,962 from the First Bank of Deerpark to Calabrian's bank account at National Westminster Bank, New Jersey.

69. On or about December 20, 1990, at the Consolidated Freightways terminal in San Bernardino County, California, coconspirator Robert Kuhnle took delivery of approximately 10,432 pounds (sixteen 55-gallon drums) of hydriodic acid solution which had been shipped from Calabrian to AAA Minerals.

70. On or about January 7, 1991, defendant CHARLES WESLEY ARLT instructed and caused defendant James Eli Wren to purchase One Piper Cherokee 6 Airplane, model no. PA32-260 (1968), serial no. S-32-1067, in the name Payback Mines, for $32,000.00 U.S. currency, contained in a brown paper bag.

71. On or about January 20, 1991, defendant CHARLES WESLEY ARLT instructed and caused James Eli Wren to purchase one Bell 47 G-2 helicopter, U.S. Registration number N59H, in the name of Payback Mines, with $65,000.00 in U.S. currency contained in a briefcase.

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72. On or about January 25, 1991, coconspirator Deanna Marie Pierce ordered approximately 10,432 pounds of hydriodic acid solution costing approximately $73,962, from Calabrian, to be delivered on or about January 30, 1991, to the Consolidated Freightways terminal, San Bernardino County, California.

73. On or about January 25, 1991, coconspirator James Eli Wren deposited $80,000 in United States currency into a bank account at the Bank of San Bernardino.

74. On or about January 25, 1991, coconspirator James Eli Wren wire transferred approximately $80,000 from the Bank of San Bernardino to a bank account at the First Bank of Deerpark controlled by coconspirator Deanna Marie Pierce.

75. On or about January 25, 1991, coconspirator Deanna Marie Pierce wire transferred approximately $73,962 from the First Bank of Deerpark to Calabrian's bank account at National Westminster Bank, New Jersey.

76. On or about January 30, 1991, coconspirators James Eli Wren and James Rocky Hill purchased Stormy Seas Four (a shrimp boat), official number 2159, in the name of Payback Mines with $51,700.00 U.S. currency, contained in a briefcase.

77. On or about February 2, 1991, at an auction, defendant CHARLES WESLEY ARLT and coconspirators James Eli Wren, James Rocky Hill, and Regina Wren purchased eleven vehicles and one boat, in the name of Payback Mines, for $105,000.00 U.S. currency.

78. On or about February 5, 1991, at the Consolidated Freightways terminal in San Bernardino County, California, coconspirator Robert Kuhnle took delivery of approximately 5,216

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pounds (eight 55-gallon drums) of hydriodic acid solution which had been shipped from Calabrian to AAA Minerals.

79. On or about February 8, 1991, at the Consolidated Freightways terminal in San Bernardino County, California, coconspirator Robert Kuhnle took delivery of approximately 5,216 pounds (eight 55-gallon drums) of hydriodic acid solution which had been shipped by Calabrian to AAA Minerals.

80. On or about February 12, 1991, coconspirator James Eli Wren distributed two 55-gallon drums of hydriodic acid solution in the parking lot of the Comfort Inn, San Bernardino, California.

81. On or about February 12, 1991, coconspirator Deanna Marie Pierce ordered approximately 10,432 pounds (sixteen 55-gallon drums) of hydriodic acid solution costing approximately $74,453, from Calabrian, to be delivered "as soon as possible" to the Consolidated Freightways terminal, San Bernardino County, California.

82. On or about February 12, 1991, defendant CHARLES WESLEY ARLT and coconspirator James Eli Wren deposited approximately $80,000 in United States currency into a bank account at the Security Pacific National Bank, San Bernardino, California.

83. On or about February 12, 1991, defendant CHARLES WESLEY ARLT and coconspirator James Eli Wren wire transferred approximately $80,000 from the Security Pacific National Bank to a bank account at the First Bank of Deerpark controlled by coconspirator Deanna Marie Pierce.

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84. On or about February 13, 1991, following several seizures by law enforcement officers of methamphetamine, chemicals and equipment used in the manufacture of methamphetamine, and large quantities of United States currency, coconspirator Deanna Marie Pierce telephoned Calabrian and requested that her order of 10,432 pounds of hydriodic acid solution be placed "on hold," stating that there had been "an accident in the mines."

85. On or about February 19, 1991, coconspirator James Rocky Hill arranged for the delivery of approximately 3,000 pounds of red phosphorous to defendant Daryle Eugene House at 56024 Tracy Boulevard, Yucca Valley, California.

86. On or about February 20, 1991, defendant Daryle Eugene House took delivery of approximately 3,000 pounds of red phosphorous at his residence located at 56024 Tracy Boulevard, Yucca Valley, California.

87. On or about February 20, 1991, coconspirator James Rocky Hill arranged for the transport of the approximately 3,000 pounds of red phosphorous to a remote mine site near Daggett, California.

88. On or about February 21, 1991, coconspirator James Eli Wren transported in excess of $123,000 in United States currency from Security Pacific National Bank, San Bernardino, California, to Mayhill Bail Bonds, San Bernardino, California.

89. On or about February 22, 1991, defendant CHARLES WESLEY ARLT purchased a cashier's check with United States currency at the Bank of America in the amount of $200,000, made payable to Unibank.

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90. On or about March 20, 1991, defendant ARLT transferred $405,095.19 from his bank account in Luxembourg, through Unibank in New York, to savings account 315-339-081 in the name of James Hill, at Security Pacific National Bank, Rubidoux Branch, 5694 Mission Boulevard, Riverside, California.

91. On or about March 21, 1991, coconspirator James Rocky Hill made arrangements with Security Pacific National Bank to withdraw $400,000 in United States currency from his savings account on March 29, 1991.

92. On or about March 29, 1991, coconspirator James Eli Wren possessed approximately $8,929.93 in U.S. currency in the following accounts: Bank of America account 01963-04647 in the name of James Eli Wren; Bank of America account 01969-04649 in the name of James Eli Wren; and Bank of America account 01964-04854 in the name of Payback Mines.

93. On or about March 29, 1991, coconspirator James Eli Wren stored approximately one hundred thirty-eight (138) silver bars, weighing approximately 13,500 ounces, at Mayhill Bail Bonds.

94. On or about March 29, 1991, defendant Daryle Eugene House possessed formulas detailing methods of manufacturing methamphetamine at his residence located on Tracy Boulevard in Yucca Valley, California.

95. On or about March 29, 1991, defendant CHARLES WESLEY ARLT and coconspirators Daryle Eugene House and Robert Kuhnle possessed a formula detailing a method of manufacturing methamphetamine at defendant CHARLES WESLEY ARLT'S ranch house, located at the Old Marriott Ranch, Osceola, Nevada.

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96. On or about March 29, 1991, defendant CHARLES WESLEY ARLT and coconspirators Daryle Eugene House and Robert Kuhnle possessed approximately 41 firearms at defendant CHARLES WESLEY ARLT'S ranch house, located at the Old Marriott Ranch, Osceola, Nevada.

97. On or about March 29, 1991, defendant CHARLES WESLEY ARLT, and coconspirators Daryle Eugene House and Robert Kuhnle possessed hydriodic acid at defendant CHARLES WESLEY ARLT'S ranch house, located at the Old Marriott Ranch, Osceola, Nevada.

98. On or about March 29, 1991, defendant CHARLES WESLEY ARLT possessed approximately 29 110-pound containers of red phosphorous on a mine site located in a remote area near Daggett, California.

As a result of the offense alleged in this count, defendant CHARLES WESLEY ARLT shall forfeit to the United States any and all property constituting or derived from any proceeds that said defendant obtained directly and indirectly as a result of the said violation, and any and all property used or intended to be used in any manner or part to commit and to facilitate the commission of the violation alleged herein, including but not limited to the following:

1. $405,748.61 U.S. currency, consisting of $405,095.19 transferred by defendant ARLT on or about March 20, 1991 from his bank account in Luxembourg, through Unibank in New York, to Security Pacific account 315-339-081 in the name of James Hill, plus interest accruing thereon from March 20 through March 29, 1991;

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2. $8,929.93 U.S. currency, seized from Bank of America account 01963-04647 in the name of Jim Wren, Bank of America account 01969-04649 in the name of Jim Wren, and Bank of America account 01964-04854 in the name of Payback Mines;

3. $123,000.00 U.S. currency, found in a box at Mayhill Bail Bonds during execution of a search warrant on March 29, 1991;

4. One Bell 47 G-2 helicopter, U.S. Registration number N59H, purchased by James Eli Wren in the name of Payback Mines on January 20, 1991, with $65,000.00 in U.S. currency contained in a briefcase;

5. Stormy Seas Four (shrimp boat), official number 2159, purchased by James Eli Wren and James Rocky Hill in the name of Payback Mines on or about January 30, 1991, with $51,700.00 U.S. currency, contained in a briefcase;

6. One Piper Cherokee 6 Airplane, model no. PA32-260 (1968), serial no. S-32-1067, purchased by James Eli Wren in the name Payback Mines on or about January 7, 1991, for $32,000.00 U.S. currency, contained in a brown paper bag;

7. One hundred thirty-eight (138) silver bars, seized at Mayhill Bail Bonds during execution of a search warrant on March 29, 1991;

8. The following eleven vehicles and one boat, purchased at an auction by defendant CHARLES WESLEY ARLT, James Eli Wren, James Rocky Hill, and Regina Wren, in the name of Payback Mines, for $105,000.00 U.S. currency:

a. One 1985 Jaguar, VIN: SAJNV5842FC119348;

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b. One 1981 Wellcraft, VIN: HALLWELT1593G788;

c. One 1988 Jaguar, VIN: SAJHU1643JC530324;

d. One 1986 Porsche, VIN: WPOAAO940GN454897;

e. One 1988 Jaguar, VIN: SAJAV1643JC521364;

f. One 1986 Chevrolet, VIN: 1G8CS18RXG0140772;

g. One 1988 Mitsubishi, VIN: JA7FL24D9JP050914;

j One 1987 Nissan, VIN: JN6ND11S3HW033709;

i One 1987 Suzuki, VIN: 1S4JC51C2H4154485;

j One 1988 Jeep, VIN: 2BCHV8157JB523469;

k. One 1988 Chevrolet, VIN: 1GCFC24KOJZ253793;

l. One 1983 Chevrolet, VIN: 1G8CS18B9D8132968.

If any of the above-described forfeitable property, as a result of any act or omission of the defendant--

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third person;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of said defendant up to the value of the above forfeitable property.

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COUNT TWO

[18 U.S.C. §§ 371, 1956(a)(1)]

I. OBJECT OF THE CONSPIRACY

Beginning on a date unknown to the Grand Jury and continuing to on or about March 29, 1991, within the Central District of California and elsewhere, defendant CHARLES WESLEY ARLT, and coconspirators James Eli Wren, Deanna Marie Pierce, James Rocky Hill, and others both known and unknown to the Grand Jury, knowingly and willfully conspired and agreed with each other to commit the following offense against the United States:

1. To knowingly and intentionally launder monetary instruments, in violation of Title 18, United States Code, Sections 371 and 1956(a)(1).

II. MEANS BY WHICH THE OBJECT OF THE CONSPIRACY WAS TO BE ACCOMPLISHED

The object of the conspiracy was to be accomplished in substance as follows:

1. The means alleged in Count One of this indictment, as set forth at paragraphs 1 to 8 of the means relating to Count One, are incorporated herein by reference and alleged as the means of this count.

III. OVERT ACTS

In furtherance of the conspiracy and to accomplish the object of the conspiracy, defendant CHARLES WESLEY ARLT, and coconspirators James Eli Wren, Deanna Marie Pierce, James Rocky Hill, and others both known and unknown to the Grand Jury, committed various overt acts within the Central District

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of California and elsewhere, including but not limited to the following:

1. The overt acts alleged in Count One of this indictment, as set forth at paragraphs 1 through 98 of the overt acts relating to Count One, are incorporated herein by reference and are alleged as overt acts 1 to 98 of this count.

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COUNTS THREE AND FOUR

[18 U.S.C. §§ 2, 1956(a)(1)]

On or about the dates listed below, in San Bernardino County, within the Central District of California, defendant CHARLES WESLEY ARLT aided, abetted, counselled, commanded, induced, procured, and caused financial transactions involving the proceeds of felonious buying, selling, and dealing in controlled substances and listed chemicals, with the intent to promote the carrying on of said unlawful activity, and knowing that the transactions were designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of such proceeds, in that defendant CHARLES WESLEY ARLT provided United States currency to Deanna Marie Pierce, who in turn wire transferred the amounts listed below from bank accounts in Texas to Calabrian International, Inc.'s bank account at National Westminster Bank in New Jersey. At said times and places, defendant CHARLES WESLEY ARLT knew that said amounts of United States currency represented the proceeds of some form of unlawful activity.

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COUNT	DATE	WIRE TRANSFER TO CALABRIAN FROM	AMOUNT
3	July 16, 1990	Texas Commerce Bank	$34,637
4	August 2, 1990	First Bank of Deerpark	$34,637

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COUNTS FIVE THROUGH NINE

[18 U.S.C. §§ 2, 1956(a)(1)]

On or about the dates listed below, in San Bernardino County, within the Central District of California, defendant CHARLES WESLEY ARLT aided, abetted, counselled, commanded, induced, procured, and caused financial transactions involving the proceeds of felonious buying, selling, and dealing in controlled substances and listed chemicals, with the intent to promote the carrying on of said unlawful activity, and knowing that the transactions were designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of such proceeds, in that defendant CHARLES WESLEY ARLT provided United States currency to Deanna Marie Pierce, who in turn wire transferred the amounts listed below from a bank account at the First Bank of Deerpark in Texas to Calabrian International, Inc.'s bank account at National Westminster Bank in New Jersey. At said times and places, defendant CHARLES WESLEY ARLT knew that said amounts of United States currency represented the proceeds of some form of unlawful activity.

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COUNT	DATE	AMOUNT
5	August 27, 1990	$68,315
6	October 10, 1990	$36,021
7	November 5, 1990	$36,981
8	December 14, 1990	$73,962
9	January 25, 1991	$73,962

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COUNTS TEN AND ELEVEN

[18 U.S.C. § 1956(a)(1)]

On or about the dates listed below, in San Bernardino County, within the Central District of California, defendant CHARLES WESLEY ARLT conducted financial transactions involving the proceeds of felonious buying, selling, and dealing in controlled substances and listed chemicals, with the intent to promote the carrying on of said unlawful activity, and knowing that the transactions were designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of such proceeds, in that defendant CHARLES WESLEY ARLT wire transferred the amounts of United States currency listed below from bank accounts at the Bank of San Bernardino, within the Central District of California, to bank accounts in Texas controlled by Deanna Marie Pierce. At said times and places, defendant CHARLES WESLEY ARLT knew that said amounts of United States currency represented the proceeds of some form of unlawful activity.

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COUNT	DATE	AMOUNT
10	July 16, 1990	$45,000
11	August 1, 1990	$35,000

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COUNTS TWELVE THROUGH SEVENTEEN

[18 U.S.C. §§ 2, 1956(a)(1)]

On or about the dates listed below, in San Bernardino County, within the Central District of California, defendant CHARLES WESLEY ARLT aided, abetted, counselled, commanded, induced, procured and caused James Eli Wren to conduct financial transactions involving the proceeds of felonious buying, selling, and dealing in controlled substances and listed chemicals, with the intent to promote the carrying on of said unlawful activity, and knowing that the transactions were designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of such proceeds, in that James Eli Wren wire transferred the amounts of United States currency listed below from bank accounts at banks within the Central District of California to bank accounts in Texas controlled by Deanna Marie Pierce. At said times and places, defendant CHARLES WESLEY ARLT knew that said amounts of United States currency represented the proceeds of some form of unlawful activity.

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COUNT	DATE	BANK FROM WHICH FUNDS WERE TRANSFERRED	AMOUNT
12	August 27, 1990	Bank of San Bernardino	$71,000
13	October 10, 1990	Bank of San Bernardino	$38,000
14	November 5, 1990	Bank of San Bernardino	$40,000
15	December 14, 1990	Bank of San Bernardino	$80,000
16	January 25, 1991	Bank of San Bernardino	$80,000
17	February 12, 1991	Security Pacific National Bank	$80,000

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COUNT EIGHTEEN

[18 U.S.C. § 1956(a)(1)]

On or about June 26, 1990, in San Bernardino County, within the Central District of California, defendant CHARLES WESLEY ARLT conducted a financial transaction involving the proceeds of felonious buying, selling, and dealing in controlled substances and listed chemicals, with the intent to promote the carrying on of said unlawful activity, and knowing that the transaction was designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of such proceeds, in that defendant CHARLES WESLEY ARLT purchased a cashier's check in the amount of approximately $35,000 at the Bank of San Bernardino, within the Central District of California, to be used for the purchase of chemicals from Calabrian International, Inc. At said time and place, defendant CHARLES WESLEY ARLT knew that said amount of United States currency represented the proceeds of some form of unlawful activity.

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COUNT NINETEEN

[18 U.S.C. § 1956(a)(1)]

On or about February 22, 1991, in San Bernardino County, within the Central District of California, defendant CHARLES WESLEY ARLT conducted a financial transaction involving the proceeds of felonious buying, selling, and dealing in controlled substances and listed chemicals, knowing that the transaction was designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of such proceeds, in that defendant CHARLES WESLEY ARLT purchased a cashier's check in the amount of $200,000 at the Bank of America. At said time and place, defendant CHARLES WESLEY ARLT knew that said amount of United States currency represented the proceeds of some form of unlawful activity.

A TRUE BILL

_____

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(3)

Supreme Court, U.S.
FILED
DEC 21 1995
CLERK

No. 95-346

In the Supreme Court of the United States

OCTOBER TERM 1995

UNITED STATES OF AMERICA, *PETITIONER*,

v.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY–THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET AL., *RESPONDENT.*

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

RESPONDENT WREN'S BRIEF IN OPPOSITION

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RESTATEMENT OF THE QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment prohibits a civil proceeding for the *in rem* forfeiture of property alleged to be:

1. "involved in" an illegal money laundering transaction; or

2. "furnished or intended to be furnished" by a person in exchange for a controlled substance; or

3. "used or intended to be used to facilitate any violation" of the federal drug laws;

after the owners of the property were criminally punished for the narcotics and money laundering crimes giving rise to the forfeitures.

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In The Supreme Court of the United States

OCTOBER TERM 1995

UNITED STATES OF AMERICA, *PETITIONER*,

v.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY–THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET AL., *RESPONDENT.*

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

RESPONDENT WREN'S BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

Respondent Wren does not oppose *certiorari*. The government's petition, however, contains overstatements and errors that affect the scope of this Court's grant of review. Specifically, the Ninth Circuit held that the government "cannot now claim that this case involves *only* the forfeiture of illegal *proceeds*." (Pet. App. 21a, emphasis in the original). For the reasons set forth below, Wren argues that this Court should grant certiorari on the

issues as recited at page i, above, in Wren's Restatement of the Question Presented.

Respondent Wren adopts the Statement of the Case filed by co-respondent Charles Arlt. (Br. in Opposition, Arlt, pages 2-7).

I. THE CIRCUIT'S DECISION BROADLY APPLIES TO AN ENTIRE CLASS OF LITIGATION AND SHOULD BE REVIEWED

Respondent Wren agrees that the issues arising from the Ninth Circuit's opinion are of paramount importance. Counsel's experience with state and federal forfeitures following the publication of *United States v. $405,089.23* indicates that the opinion — along with consonant decisions in the Third, Fifth, Sixth, Seventh, and D.C. Circuits — profoundly affect private, state, and federal interests. Although *$405,089.23* involves only federal civil forfeiture under Titles 18 and 21, Amicus curiae have correctly noted that the impact of the Circuit's opinion may affect other governmental sanctions.

Petitioner and Amici have overstated, however, the significance of the split between the circuits. The circuits in opposition to *United States v. $405.089.23*, reached their conclusions prior to this Court's decision in *Department of Revenue of Montana v. Kurth Ranch*, 114 S.Ct. 1937 (1994). Since *Kurth Ranch*, other circuits have adopted fundamental portions of *United States v.$405,089.23*. *See United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995), *petition for cert. pending*, No. 95-345 ; *United States v. Perez*, ___ F.3d ___ , 1995 WL 689385 (5th Cir. 1995). In each instance, the circuits have adopted the categorical test announced in *Austin v. United States*, 113 S.Ct. 2801 (1993).

At the latest count, six circuits have held that civil forfeitures under 21 U.S.C. § 881(a) are sufficiently punitive so as to constitute punishment for the purposes of the Double Jeopardy Clause. *See also United States v. Baird*, 63 F.3d 1213 (3rd Cir. 1995); *United States v. Torres*, 28 F.3d 1463 (7th Cir. 1994); and *United States v. Rhodes*, 62 F.3d 1449, 1452 (D.C. Cir. 1995).

Nevertheless, a split does exist and, even among the circuits in line with the Ninth Circuit's analysis, there are divisions involving secondary issues.[1]

II. THE GOVERNMENT'S "STATEMENT OF THE QUESTION PRESENTED" MISREPRESENTS THE *$405,089.23* PANEL'S EXPLICIT HOLDING REGARDING SO-CALLED "PROCEEDS"

Wren also challenges the government's and amici's characterization of the Ninth Circuit's decision. Both argue that the opinion bars forfeiture of "proceeds", "profits", or "contraband". See Pet. at 10-11; Amicus, at 2. This is not what the panel held.

Responding to the same characterization, the panel noted that the texts to 21 U.S.C. 881(a)(6) and 981(a)(1)(A) were *not* limited to profits, return on investment, or proceeds:

> * * * the government misrepresents the sweep of the forfeiture statutes it invokes in this case. Despite the government's argument, the

[1] E.g., the court in *Ursery* criticized the Ninth Circuit's categorical rule determining that serial civil forfeiture and criminal prosecutions were not a single proceeding. *Ursery* held that the issue must be determined on a case–by–case analysis. *Ursery*, 59 F.3d at 575. *Ursery* also questioned the Ninth Circuit's application of double jeopardy analysis to 21 U.S.C. § 881(a)(6).

> statutes are not limited to the proceeds of illegal activity.

United States v. $405,089.23, 33 F.3d at 1221; Pet. App. at 20a. The panel then recited the specific statutory language of § 881(a)(6), to draw the distinction as plainly as possible. Regarding the money laundering statute, the opinion was even more emphatic:

> Because the government argued vigorously in the district court that § 981(a)(1)(A) is not limited to the proceeds of illegal activity, and it continues to rely on that statute in defending the district court's order of forfeiture, it cannot now claim that this case involves *only* the forfeiture of illegal *proceeds*.

United States v. $405,089.23, 33 F.3d at 1222 n. 12; Pet. App. at 21a, (emphasis in the original).

The government urged a broad legal justification for the forfeiture of Wren's and Arlt's cash, aircrafts, vessle, precious ore, and vehicles.[2] It now seeks to restrict this Court's review to the "remedial" disgorgement of "proceeds", or even more narrowly to "profits." The forfeiture statutes do not support such a crabbed review, nor would the artificially narrowed proceeds theory free this Court from the fact-bound record presented at summary judgment and reviewed by the Ninth Circuit. The issue facing this Court is not whether disgorging "proceeds" is proportionate and remedial under *United States v. Halper*, 490 U.S. 435 (1989) but whether forfeitures under § 881(a)(6) and § 981(a)(1)(A) are categorically punishment under *Austin*.

[2] See for example, the government's Statement of Conclusions of Law, ¶ 68-72. (Pet. App. 70a-72a).

CONCLUSION

The petition for *certiorari* should be granted and directed to the issues set forth in Section II and the Restatement of the Question Presented, above.

Respectfully submitted.

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DECEMBER 1995

EDITOR'S NOTE

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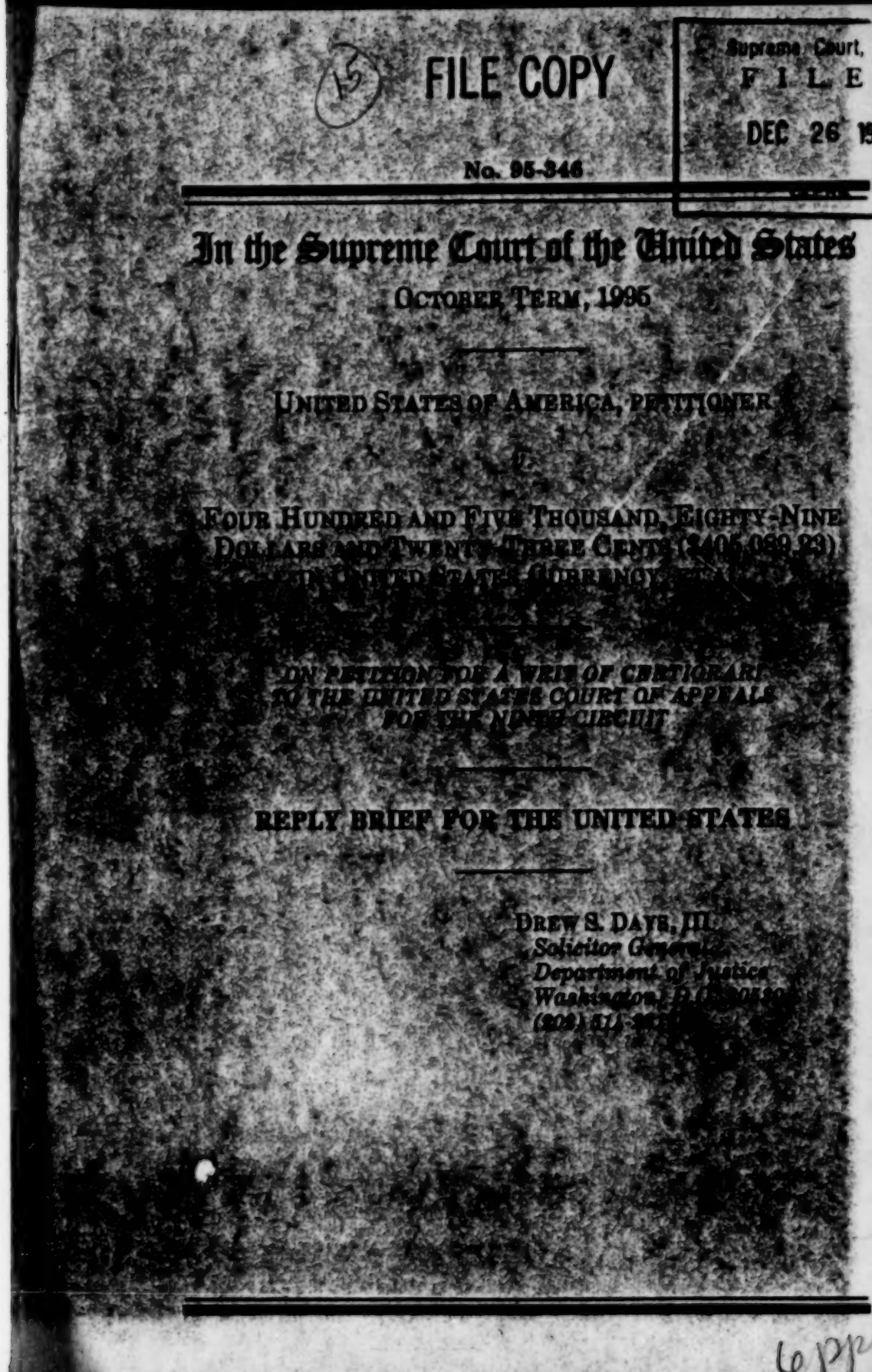

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Supreme Court, U.S.
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No. 95-346

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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UNITED STATES OF AMERICA, PETITIONER

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Respondent Wren agrees that the Court should grant certiorari in this case. Br. in Opp. 5. He contends, however, that this Court should reformulate the question presented. *Id.* at 1, 5. In Wren's view, the Court should consider only the question "whether forfeitures under [21 U.S.C.] § 881(a)(6) and [18 U.S.C.] § 981(a)(1)(A) are categorically punishment" for purposes of the Double Jeopardy Clause. *Id.* at 4; see also *id.* at i (restating question). Wren's attempt to reframe the question before the Court lacks merit.

Our petition presents the question whether the Double Jeopardy Clause prohibits a civil proceeding for the *in rem* forfeiture of property "alleged to be the proceeds of narcotics and money laundering activ-

ities," when the owners of the property were previously convicted of narcotics and money laundering crimes. Pet. (I). That question directly challenges the holding of the court of appeals that the issue of whether the forfeiture of such "proceeds" constitutes punishment for double jeopardy purposes is not determined by examining the particular property at issue, but is determined through a categorical analysis of the statute employed by the government:

> The government * * * asserts that *this* forfeiture involves only narcotics proceeds, and that such a forfeiture is entirely remedial. The government's position finds support in a recent Fifth Circuit case. *See United States v. Tilley*, 18 F.3d 295, 300 (5th Cir. 1994) (stating that the forfeiture of illegal proceeds does not constitute punishment) [cert. denied, 115 S. Ct. 573, 574 (1994)]. We nonetheless reject that argument. We do so because the government fails to recognize the legal standard that *Austin* [v. *United States*, 113 S. Ct. 2801 (1993)] established.
>
> Under *Austin*, in order to determine whether a forfeiture constitutes "punishment," we must look to the entire scope of the statute which the government seeks to employ, rather than to the characteristics of the specific property the government seeks to forfeit.

Pet. App. 16a (footnote omitted). Respondent's proposed revision of the question presented assumes that the Ninth Circuit is correct, *i.e.*, that a "categorical" analysis of the forfeiture statute is required. Our submission, reflected in our question presented, is that the characteristics of the specific property that the government seeks to forfeit *must* be examined—and that when the property constitutes "proceeds" of illegal activity, its forfeiture is remedial rather than punitive. Pet. 9-14.[1]

Respondent Wren also suggests that the question should be revised because the court of appeals found that, in light of the breadth of the forfeiture statutes at issue and the government's arguments in the district court, the government "cannot now claim that this case involves *only* the forfeiture of illegal *proceeds*." Br. in Opp. 1, 4, quoting Pet. App. 21a n.12. On its face, however, the court of appeals' statement does not suggest that *no* illegal proceeds were forfeited in this case; rather, the court expressed the view that the government cannot claim that "only" proceeds were at issue. Nothing in that statement requires revision of the question we have presented.[2]

---

[1] Respondent's restatement of the question presented is different from ours not because it is framed to encompass the statutory scope of forfeitable property under 21 U.S.C. 881(a)(6) and 18 U.S.C. 981, rather than the "narcotics proceeds" at issue here, but also because it ironically omits the very phrase of 21 U.S.C. 881(a)(6) that specifically authorizes forfeiture of "all proceeds traceable to such an exchange [for a controlled substance in violation of this subchapter]."

[2] As the court of appeals noted, the government claimed that "the property was forfeitable on two independent grounds: as proceeds of illegal narcotics transactions under 21 U.S.C. § 881(a)(6), and as property 'involved in' money laundering violations under 18 U.S.C. § 981(a)(1)(A)." Pet. App. 3a. The district court found probable cause to support the forfeiture "under both [the government's] 'narcotics proceeds' theory and its 'money laundering' theory." *Id.* at 4a. In our view, either theory would be sufficient to support the forfeiture, and if the forfeiture of "narcotics proceeds" is not punitive, then the sanction in this case would be fully remedial under *United States* v. *Halper*, 490 U.S. 435, 449 (1989).

We agree with respondent that the issue of whether it constitutes "punishment" when the government forfeits property that was "involved in" or "facilitated" a violation of the federal drug laws is an issue that merits this Court's review. It is precisely that question that we have presented in our petition for a writ of certiorari in *United States* v. *Ursery*, No. 95-345, a case that squarely raises the issue. The possibility that this case *may* involve some facilitating property is not a reason to alter our question presented here; rather, it is a reason to grant both this petition and our petition in *Ursery* in order to resolve the double jeopardy issues that have created conflicts and confusion in the lower courts.

Since this Court's decisions in *Halper*, *Austin*, and *Department of Revenue of Montana* v. *Kurth Ranch*, 114 S. Ct. 1937 (1994), experience in the courts of appeals indicates substantial uncertainty and conflict over the meaning and reach of those decisions. Since the filing of our petitions in *$405,089.23* and *Ursery*, the Fifth Circuit held that the forfeiture of a vehicle under 21 U.S.C. 881(a)(4), because it was used to transport or facilitate the transportation of narcotics, constituted "punishment" for double jeopardy purposes. *United States* v. *Perez*, 70 F.3d 345 (5th Cir. 1995) (1995 WL 689385). The Sixth Circuit held that the "forfeiture of [a] car as drug proceeds under 21 U.S.C. § 881(a)(6) did not constitute punishment," and specifically rejected the "categorical rule that all civil forfeiture constitutes punishment for double jeopardy purposes" adopted by the Ninth Circuit. *United States* v. *Salinas*, 65 F.3d 551, 553 (6th Cir. 1995). The Second Circuit noted that it, unlike the Ninth Circuit, had yet not read this Court's decisions in *Austin* and *Kurth Ranch* to require it to abandon

its practice under *Halper* of "mak[ing] individualized, case-by-case determinations of whether particular civil sanctions constitute 'punishment,'" and observed that "[t]he significance of these issues is not easily overstated." *United States* v. *All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 491-493 & n.5 (2d Cir. 1995). And the Eighth Circuit has rejected the Ninth Circuit's "categorical approach to double jeopardy analysis" in the course of holding that "the forfeiture of the fruits of illegal activity is rationally related to the damages of that activity" and does not constitute punishment under *Halper*. *United States* v. *Clementi*, No. 95-2079, 1995 WL 704334, at *2-*3 (8th Cir. Dec. 1, 1995). As Judge King noted in her special concurrence in *United States* v. *Perez*, 1995 WL 689385, at *5-*6, this Court's decisions in *Halper* and *Austin* have produced "confusion" in a context that has "enormous," "practical consequences to the administration of justice."

> Traditionally, the civil forfeiture of property involved in criminal activity and the criminal prosecution of the property's owner for the same underlying conduct did not raise issues under the Double Jeopardy Clause. * * * The question, which cries out for resolution by the Supreme Court, is whether, or to what extent, *Halper* and *Austin* have changed that rule.

Id. at *5. As Judge King observed, this is "an area that the Supreme Court should revisit." *Id.* at *6.

* * * * *

For the foregoing reasons and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari be granted.

DREW S. DAYS, III
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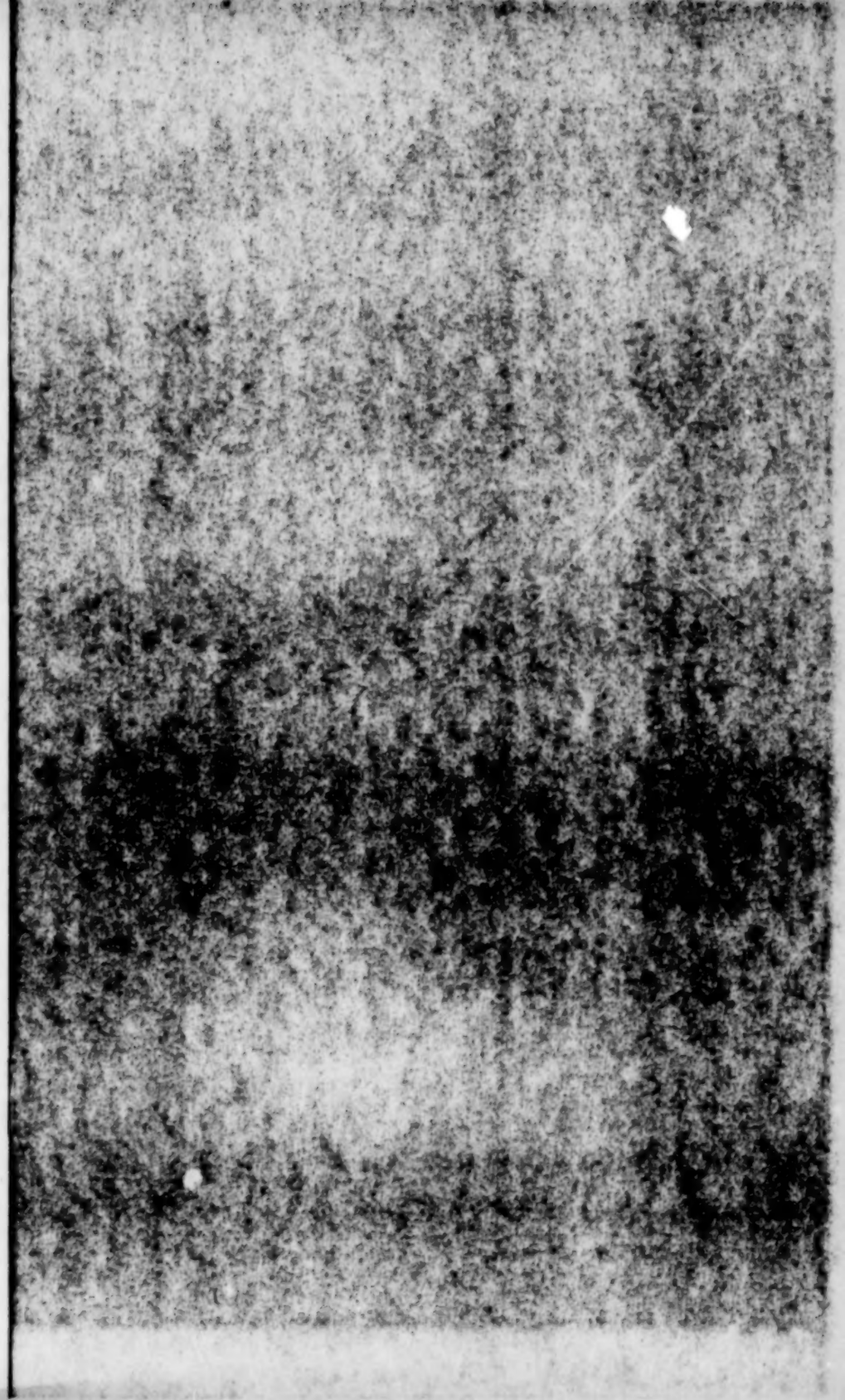
DECEMBER 1995



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Supreme Court, U.S.
FILED
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No. 95-346

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

UNITED STATES OF AMERICA, *Petitioner*,

v.

FOUR HUNDRED FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The amici curiae Commonwealth of Massachusetts and the states identified on the cover, through their attorneys general, respectfully submit this brief in support of the United States' petition for certiorari.

STATEMENT OF INTEREST

The Court of Appeals barred the civil forfeiture of drug proceeds as a second "punishment" under the Double Jeopardy Clause for defendants previously convicted of drug offenses. Although the decision construed 21 U.S.C. § 881 (a)(6), the states have a strong interest in this case. Many have civil forfeiture statutes patterned after § 881,[1] and those with a different form of statute[2] face double jeopardy challenges

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[1] *E.g., In the Matter of One 1987 Toyota*, 621 A.2d 796, 798 (Del. Super. Ct. 1987) (Delaware statute "modeled closely upon" § 881); *Idaho Dept. of Law Enforcement v. Real Property Located in Mindoka County, Idaho*, No. 20626 (Idaho June 8, 1994) (Idaho statute "virtually identical to" § 881); *Illinois v. Towns*, 269 Ill. App. 3d 907, 915, 646 N.E.2d 1366, 1371, 206 Ill. Dec. 279, 284 (Ill. App. Ct. 1995) (Illinois statute is "patterned after" § 881); *Love v. One 1967 Chevrolet El Camino*, 247 Kan. 469, 473, 799 P.2d 1043, 1047 (Kan. 1990) (Kansas statute "almost identical to" § 881); *Louisiana v. 1979 Cadillac Deville*, 632 So. 2d 1221, 1224 (La. Ct. App. 1994) (Louisiana statute "patterned after" § 881); *South Dakota v. One 1983 Black Toyota Pickup*, 415 N.W.3d 511, 513 n.* (S.D. 1987) (South Dakota statute is "patterned" after § 881).

[2] Some states have adopted new model forfeiture codes, such as the Model Asset Seizure and Forfeiture Act,, *e.g.*, Ark. Code Ann. §§ 5-64-505 to 5-64-509 (Michie 1993); Ga. Code Ann. § 16-13-49 (Supp. 1994); Haw. Rev. Stat. §§ 712A-1 to 712A-20 (Supp. 1992); La. Rev. Stat. Ann. §§ 40: 2601 to 40: 2622 and §§ 32: 1550 to 32: 1553 (Supp. 1995); Or. Rev. Stat. Ann. § 166 (Supp. 1993), or the Commission Reform Act of 1994 drafted by the President's Commission on Model State Drug Laws, *e.g.*, Ariz. Rev. Stat. Ann §§ 13-4301 to 13-4315 (Supp. 1994); Kan. Stat. Ann. §§ 65-4135 to 65-4175 (1992).

relying on the decision below. Although state statutes vary in subject matter and scope, virtually all authorize civil forfeiture of the proceeds of criminal conduct.

Civil forfeiture is an essential tool in the states' efforts to remedy the effects of crime. In particular, "[a]s an integral part of the 'war on drugs,'" civil forfeiture efforts around the country have recaptured millions of dollars in illegal profits that otherwise would have been reinvested in the expansion of the market for the sale of drugs nationwide. *United States v. Stanwood*, 872 F. Supp. 791, 793 (D. Or. 1994). "Taking away the profits of drug crimes is a powerful weapon to cripple drug-trading enterprises." *United States v. All Funds on Deposit*, 801 F. Supp. 984, 989 (E.D.N.Y. 1992). Civil forfeiture also compensates for costs related to the investigation and prosecution of drug offenses and other crimes.[3]

SUMMARY OF ARGUMENT

The issues presented are important. As a result of the decision below, the states face a significant increase in vexatious double jeopardy litigation. Like *$405,089.23*, many actions seek to invalidate civil forfeiture proceedings concluded after a parallel criminal conviction. Others challenge *criminal* prosecutions that follow related civil forfeiture proceedings. In fact, criminal convictions have been reversed on double jeopardy grounds by the Sixth Circuit in *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995), *petition for cert. pending*, No. 95-345, and by district courts within the Ninth Circuit. Still other suits rely on *$405,089.23* in increasingly novel ways to invalidate "driving under the influence" convictions or criminal convictions of licensed professionals, where there has been a prior administrative license suspension or revocation. The states' need for guidance from this Court is acute.

Moreover, the Ninth Circuit acknowledged that its decision conflicts with *United States v. Tilley*, 18 F.3d 295 (5th Cir.), *cert. denied*, 115 S. Ct. 1574 (1994). It also conflicts with *SEC v. Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994), and *United States v. Carson*, 52 F.3d 1173, 1182-83 (2d Cir. 1995), and conflicts among the district and state courts are proliferating.

Finally, by establishing a categorical rule that *all* civil forfeitures of proceeds impose "punishment," without assessing the particular forfeiture at issue here, and by ignoring the remedial purposes underlying proceeds forfeiture, the decision conflicts with *United States v. Halper*, 490 U.S. 435 (1989), and *Austin v. United States*, 113 S. Ct. 2801 (1993), and with the fundamental principle underlying *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989).

REASONS FOR GRANTING REVIEW

I. THE DECISION BELOW HAS HAD A SEVERE CHILLING EFFECT ON THE STATES' ENFORCEMENT OF THEIR CIVIL FORFEITURE AND CRIMINAL LAWS.

The Court of Appeals held that because civil forfeiture of proceeds constitutes "punishment" under the Double Jeopardy

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[3] Funds recovered from forfeited property are often earmarked for expenditure on costs related to investigating and prosecuting such criminal activity. *E.g.*, Ariz. Rev. Stat. Ann. §§ 13-2314.01, 13-2314.03 and 13-4315(c); Fla. Stat. ch. 932.7055(3) - (6); La. Rev. Stat. ch. 40, § 2616 (1994); 15 Me. Rev. Stat. Ann. § 5822 (4)(A) (1991)(Supp.); Mich. Comp. Laws § 333.7524 and § 610.4708 (1994); Minn. Stat. § 609.5315, subd.. 4, 5 (1994); Mont. Code Ann. § 44-12-206 (1994); N.H. Rev. Stat. Ann. § 318-B: 17-b, 17-c (1994); N.J. Rev. Stat. § 2C: 64-6 (1994); 1989 Or. Laws 791, § 2 (11); 42 Pa. Cons. Stat. Ann. § 6801 (1995); R.I. Gen. Laws § 21-28-5.04(3) (1994); Utah Code Ann. § 58-37-13(3) and 58-37-15(j) (1994).

Clause, it is barred where there has been a prior criminal prosecution. 33 F.3d 1210, 1218-22. The seven circuit judges dissenting from denial of rehearing en banc observed that "[g]iven the national importance of the civil forfeiture program and the damage that can be wrought from getting it wrong," further review of the decision is of critical importance. 56 F.3d 41, 43. Failing to review the decision "lets stand a decision that 'could free hundreds of drug dealers across the western United States.'" *Id.* at 42 (citation omitted).

For the states, these concerns have become a reality. Nationwide the states face an influx of new double jeopardy challenges where *$405,089.23* is cited as a basis for invalidating not only civil forfeiture proceedings[4] but also criminal prosecutions.[5] Some offenders have relied on *$405,089.23* to win reversal of their convictions already,[6] in the state trial courts,[7] district courts within the Ninth Circuit,[8] and the Sixth Circuit in *United States v. Ursery*, 59 F.3d 568 (6th

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[4] *E.g., Arizona v. Leyva*, No. CV 90-03498 (Ariz. Ct. App. Sept. 12, 1995) (invalidating civil forfeiture judgment; motion for reconsideration pending); *Nevada v. 1984 Ford F-250*, No. CV 1570691 (7th Dist. Ct.) (pending motion for relief from civil forfeiture judgment).

[5] *E.g., Rice v. Arizona*, No. 2CA-SA 94-0133 1995 WL 507572 (Ariz. Ct. App. Aug. 29, 1995) (seeking dismissal of drug charges); *Kansas v. Johnson*, No. 95-CR-22 (Kan. Dist. Ct.) (challenging conviction for methamphetamine trafficking); *Massachusetts v. Penta*, No. 87-3109 and 87-3110 (Middlesex Super. Ct.) (challenging conviction for cocaine trafficking); *Wright v. Nevada*, No. 25632 (Nev.) (challenging conviction for manufacturing marijuana); *Gordon v. Eighth Judicial District Court of Nevada*, Case No. 26722 (Nev.) (challenging court's authority to proceed on criminal racketeering charges); *Virginia v. Ferguson*, No. 5786, 5787 (Va. Cir. Ct.) (challenging conviction for possession of cocaine with intent to distribute).

[6] These cases represent not merely an application but an expansion of *$405,089.23*, which ignores this Court's careful distinction, in *Kurth Ranch*, between the issue of whether a civil sanction should be barred under the Double Jeopardy Clause and "whether an ostensibly civil proceeding that is designed to inflict punishment may bar a subsequent proceeding that is admittedly criminal in character." *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1947 n. 21 (1994).

[7] *E.g., Massachusetts v. Viveira*, No. 34516-20 (Bristol Super. Ct. May 30, 1995) (following the "sound reasoning" of *Austin* and *$405,089.23*).

[8] *E.g., Oakes v. United States*, 872 F. Supp. 817, 826 (E.D. Wash. 1994) (granting habeas relief to a drug offender who was to have served a mandatory minimum sentence of five years for manufacturing marijuana). *United States v. McCaslin*, 863 F. Supp. 1299, 1307 (W.D. Wash. 1994), decided almost contemporaneously with *$405,089.23*, similarly vacated on double jeopardy grounds the conviction of a drug offender who had served his fifteen months prison sentence but had not completed his three years of supervised release. Numerous other cases have indicated in dicta that under *$405,089.23* offenders generally are entitled to such relief, although the particular case was factually distinguishable because (1) the offense underlying the forfeiture differed from the offense of which defendant was convicted, *United States v. Shorb*, 876 F. Supp. 1183, 1186-87 (D. Or. 1995); (2) the criminal defendant had failed to assert a claim to the seized property and thus jeopardy did not attach in the civil forfeiture proceeding, *United States v. Nakamoto*, 876 F. Supp. 235, 239 (D. Haw. 1995); *United States v. Walsh*, 873 F. Supp. 334 (D. Ariz. 1994); or (3) as in *$405,089.23* jeopardy attached in the civil proceeding later than in the criminal proceeding, *United States v. Branum*, 872 F. Supp. 801, 803 (D. Or. 1994); *United States v. Kemmish*, 869 F. Supp. 803 (S.D. Calif. 1994).

Cir. 1995), *petition for cert. pending*, No. 95-345.[9] Because new state actions challenging state forfeiture statutes are raising federal constitutional challenges, federal court decisions are of particular concern to the states.

In the state courts, the reasoning of the decision below has been applied in quite different contexts, adding to the proliferation of new double jeopardy cases and threatening disastrous results for law enforcement. Some actions have sought to invalidate "driving under the influence" convictions that follow administrative license revocations.[10] Others have sought to reverse criminal convictions of licensed professionals previously subjected to sanctions by the civil licensing

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[9] The *amici* states understand that the United States will also be seeking certiorari review of *Ursery*, which the amici states strongly support. Most of the arguments stated herein also support granting certiorari in *Ursery*.

[10] For examples of cases in support of the prosecution, *see Snow v. Superior Court of Arizona*, Case No. 1 CA-SA 950102 1995 WL 332263 (Ariz. Ct. App. June 6, 1995); *Baldwin v. Department of Motor Vehicles*, 35 Cal. App. 4th 1630 (Cal. Ct. App. 1995); *Delaware v. Ford*, Case No. Cr.A# 94-100075 (Del. Ct. Com. Pl. Feb., 13, 1995); *Davidson v. MacKinnon*, 656 So. 2d 223 (Fla. Dist. Ct. App. 1995); *Hawaii v. Higa*, 79 Haw. 1, 897 P.2d 928 (Haw. 1995); *Maine v. Savard*, 659 A.2d 1265 (Me. 1995); *Minnesota v. Hanson*, 532 N.W.2d 589 (Minn. Ct. App. 1995); *Nebraska v. Young*, 3 Neb. App. 539, 530 N.W.2d 269 (Neb. Ct. App. 1995); *New Hampshire v. Cassady*, 662 A.2d 955 (N.H. 1994); *Ohio v. Miller*, No. 95CA8 1995 WL 505939 (Ohio Ct. App. May 12, 1995); *Cleveland v. Nutter*, 68 Ohio Misc. 2d 46, 646 N.E.2d 1209 (Ohio Mun. Ct. 1995); *Cleveland v. Miller*, 68 Ohio Misc. 2d 52, 646 N.E.2d 1213 (Ohio Mun. Ct. 1995); *Hubbard v. Texas*, 903 S.W. 2d 892 (Tex. Ct. App. 1995). For examples of cases supporting the defense *see Connecticut v. Hickham*, No. MV94-618025 1995 WL 243352 (Conn. Super. Ct. April 20, 1995); *Florida v. Reilly*, Case No. 94-6661MM10 (Broward Cnty. 1994); *Ohio v. Gustafson*, Case No. 94 C.A. 232 1995 WL 387619 (Ohio Ct. App. June 27, 1995) .

authority.[11] While in some states, these unusual applications of *$405,089.23* have had little success, in others, such novel applications have been successful at the trial court or lower appellate court level.[12] Given the array of remedies used by the states to address the deleterious effects of criminal conduct, the potential breadth of *$405,089.23's* application is staggering.[13]

In the aftermath of *$405,089.23*, state attorneys around the country are questioning how or whether to proceed with parallel criminal prosecutions and civil forfeiture proceedings. The Ninth Circuit approach -- requiring prosecutors "to choose whether to include a criminal forfeiture count in the indictment" or "to pursue only the civil forfeiture action," 33 F.3d 1210, 1222 -- offers no acceptable alternative for timely, full and fair law enforcement for the many states lacking a criminal forfeiture statute. The government is faced with the Hobson's choice of forgoing either a typical *in rem* civil forfeiture

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[11] *Schillerstrom v. Arizona*, 885 P.2d 156 (Ariz. 1994); *Loui v. Board of Medical Examiners*, 889 P.2d 705 (Haw. 1995); *Alexander v. Louisiana Board of Medical Examiners*, 644 So.2d 328 (La. Ct. App. 1994). *See also Bae v. Shalala*, 44 F.3d 489 (7th Cir. 1995) (double jeopardy challenge where lawyer disbarred); *Ayars v. New Jersey Department of Corrections*, 597 A.2d 1084 (N.J. Super. Ct. 1991) (double jeopardy challenge by prison guard claiming that previous prosecution for tax evasion barred state from removing him from his position).

[12] See cases cited in note 11.

[13] Other challenges have relied on *$405,089.23* as a basis for invalidating criminal convictions following loss of good time or disciplinary transfer. *E.g., United States v. Brown*, No. 94-30271 (9th Cir. June 20, 1995); *Garrity v. Fiedler*, 41 F.3d 1150, 1151-53 (7th Cir. 1994); *Connecticut v. Walker*, 646 A.2d 209, (Ct. App.), *certification denied*, 648 A.2d 159 (Conn. 1994); *Maine v. O'Connor*, No. CR-95-89 (Knox Sup. Ct. July 18, 1995); *Wild v. Virginia*, 446 S.E.2d 626, 627 (Va. Ct. App. 1994).

proceeding or a criminal prosecution. Even in states with criminal forfeiture statues, the indictment and trial of the criminal offense could be complicated and often delayed by the simultaneous adjudication of the defendant's and the government's interests in the forfeited property, particularly if there are third-parties claiming to be innocent owners.[14]

In contrast, the states' pre-existing and widespread practice of allowing parallel criminal and civil *in rem* proceedings provides a single forum for adjudicating all claims to the seized property -- including those of both criminal suspects and "innocent owners" -- and distinguishing nominal from real interests in property. A civil proceeding offers procedural mechanisms not available in criminal proceedings -- such as liberal discovery, motions to dismiss, and motions for judgment on the pleadings or summary judgment -- and a court system with the experience and expertise suited to the full and efficient adjudication of civil property rights.[15]

Despite these advantages, state prosecutors nationwide are reluctant to go forward with parallel civil forfeiture and criminal proceedings and thereby risk invalidation of criminal convictions, as in *Ursery*. Other prosecutors, fearing that *$405.089.23* may lead to the invalidation of driving under the influence convictions, have counselled police officers to refrain from taking driver's licenses away from suspects. Because the decision below has had such a chilling effect on enforcement of

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[14] In addition, if seizure of assets is delayed -- because, for example, they have been hidden or transferred -- prosecutors would have to either delay the criminal trial and forgo forfeiture entirely.

[15] Moreover, the states support the United States' argument that civil forfeiture and the related criminal prosecution are part of "the same proceeding" for Double Jeopardy purposes.

state criminal and civil forfeiture law, the states seek guidance from this Court.

II. THE NINTH CIRCUIT DECISION CONFLICTS WITH THE DECISIONS OF THREE OTHER CIRCUITS.

The Ninth Circuit acknowledged that its holding squarely conflicts with *United States v. Tilley*, 18 F.3d 295, 300 (5th Cir.), *cert. denied*, 115 S. Ct. 1574 (1994), that the civil forfeiture of proceeds did not constitute punishment under the Double Jeopardy Clause. In addition, the decision conflicts with *SEC v. Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994) (following *Tilley* in holding that an order requiring a convicted defendant to disgorge the profits of illegal securities trading did not constitute punishment under the Double Jeopardy Clause), and *United States v. Carson*, 52 F.3d 1173, 1182-83 (2d Cir. 1995) (same).[16]

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[16] Two other circuits have also refused to take the Ninth Circuit's extreme categorical approach to defining "punishment." As the decision below acknowledged, the Fourth Circuit, in a pre-*Austin* case, held that civil forfeiture of proceeds was not punishment under the Double Jeopardy Clause. *United States v. Borromeo*, 995 F.2d 23, 27 (4th Cir. 1993). In a subsequent appeal in *United States v. Borromeo* (*Borromeo II*), 1 F.3d 219, 221 (4th Cir. 1993), the Fourth Circuit remanded the case for a particularized determination of whether the forfeiture of property derived from criminal proceeds was excessive under *Austin*. Likewise, the Eighth Circuit, in considering whether a criminal forfeiture was an "excessive fine" under the Eighth Amendment, acknowledged that the forfeiture of proceeds is never punishment. *United States v. Alexander*, 32 F.3d 1231, 1236 (8th Cir. 1994). On the other hand, as noted *supra*, the Ninth Circuit's approach was followed and expanded by the Sixth Circuit, which held that, at least in the real estate forfeiture context, civil forfeiture did constitute "punishment" under the Double Jeopardy Clause, and thus the later-occurring criminal conviction was invalidated as an unconstitutional second punishment. *United States v. Ursery*, No. 94-1127 (6th Cir. July 13, 1995), *petition for cert. pending*, No. 95-345.

This circuit split, moreover, is creating further conflicts among the district courts and state courts. As noted above, within the Ninth Circuit, district courts have applied *$405,089.23* so as to invalidate not only civil forfeiture proceedings but also criminal convictions.[17] Other district courts, however, have rejected the approach of *$405,089.23*, often following *Tilley* and *Bilzerian*.[18] *$405,089.23* has also generated confusion among the state courts -- and even conflicts

[17] *See* p. 5-6 & nn. 7-8 *supra*.

[18] *E.g., United States v. Pipkin*, Cr. No. H-92-293 (S.D. Tex. May 17, 1995) (holding that the forfeiture of proceeds is not punitive and thus did not violate the Double Jeopardy Clause); *United States v. Land*, 1995 WL 296391 (E.D. La. May 15, 1995) (same); *United States v. Contents of Account Number 383-1637-4*, No. 94 Civ. 5114 (D.N.J. April 13, 1995) (refusing to follow *$405.089.23*); *Biereger v. United States*, No 94 Civ. 2359 (D.N.J. Jan. 18, 1995) (holding that forfeiture of drug proceeds is remedial, following *Tilley*, and rejecting *$405,089.23)*; *In re Moffitt, Zwerling & Kemler, P.C.*, 846 F. Supp. 463 (E.D.Va. 1994) (holding that forfeiture of drug proceeds is remedial). *See also Crowder v. U.S.*, 874 F. Supp. 700, 704 (M.D.N.C. 1994) (although disposing of the case on other grounds, concluding that the Fourth Circuit would follow the Fifth and D.C. Circuits rather than the Ninth Circuit on the issue of whether civil forfeiture constituted punishment under the Double Jeopardy Clause). *See also United States v. Fifty Thousand Dollars in United States Currency*, No. 93C3874 1994 US Dist. WL 75145 (N.D. Ill. March, 8, 1994) (distinguishing *$405,089.23* and holding that *Austin* did not affect the traditional presumption that forfeiture of items involved in customs violations is wholly remedial.)

within the same state[19] -- considering federal constitutional challenges to their own forfeiture statutes.

III. THE NINTH CIRCUIT DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT.

The Ninth Circuit explicitly relied on *Austin v. United States*, 113 S. Ct. 2801 (1993) and *United States v. Halper*, 490 U.S. 435 (1989) in holding that civil forfeiture after a criminal conviction constitutes punishment under the Double Jeopardy Clause. According to the decision, *Austin* "explicitly refused to apply . . . a case-by-case approach to determining whether a forfeiture constitutes 'punishment,'" and instead "look[ed] to the requirements of the forfeiture *statute* as a whole," adopting what the Ninth Circuit describes as a "categorical approach to punishment determinations in the forfeiture context." 33 F.3d 1210, 1220. The decision holds that *Austin* thus created "a

[19] Compare *In re 2120 S. 4th Ave.*, 177 Ariz. 599, 603, 870 P. 2d 417, 421 (Ariz. Ct. App. 1994) (Arizona statute is remedial and not punitive) with *Arizona v. Leyva* No. CV 90-03498 (Ariz. Ct. App. Sept. 12, 1995) (money judgment for amount of gain acquired through racketeering under Arizona stature is punitive; adopts reasoning of *$405.089.23*; motion for reconsideration pending), *Fant v. Texas,*, 881 S.W.2d 830, 833-34 (Tex. Ct. App. 1994) (Texas forfeiture law is punitive and triggers double jeopardy protection) with *Johnson v. Texas*, 882 S.W. 2d 17, 19-20 (Tex. Ct. App. 1994) (Texas law is primarily remedial and Double Jeopardy Clause is not implicated unless the forfeiture is "overwhelmingly disproportionate to the damage appellant caused"). Compare *Illinois v. Towns*, 269 Ill. App. 3d 907, 911, 646 N.E.2d 1366, 1368, 206 Ill. Dec. 279, 281 (Ill. App. Ct. 1995) (distinguishing *$405,089.23* on the facts but explicitly adopting its reasoning for future cases), with *Hines v. Iadarola*, 164 Misc. 2d 204, 623 N.Y.S.2d 999 (N.Y. Super. Ct. 1995) (rejecting *$405,089.23* and following *Tilley* in holding that proceeds forfeiture is not punishment under the Double Jeopardy Clause).

strong presumption that any forfeiture statute does not serve *solely* a remedial purpose." *Id.* at 1221. In fact, this approach to the meaning of punishment under the Double Jeopardy Clause conflicts with *Halper, Austin,* and *Department of Revenue of Montana v. Kurth Ranch,* 114 S. Ct. 1937 (1994).

A. The Court of Appeals' Adoption of an Overbroad Categorical Approach Conflicts With *Halper* and *Austin*.

The Double Jeopardy Clause prohibits three distinct abuses: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and a second punishment for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). In *United States v. Halper*, 490 U.S. 435 (1989), this Court for the first time considered whether a penalty imposed in a civil proceeding may constitute a second "punishment" under the Double Jeopardy Clause. *Halper* announced "a rule for the rare case" where a civil penalty "may be so extreme and so divorced from the Government's damages and expenses as to constitute punishment" within the meaning of the Double Jeopardy Clause. 490 U.S. 435, 449, 441-42.

This determination whether a civil sanction constitutes punishment "requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve," the Court noted, reasoning:

> This constitutional provision is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state.

Id. at 447, 448. The Court thus established a flexible "rule . . . of reason" allowing relief only where the civil penalty

bears "no rational relation to the goal of compensating the Government for its loss," and thus "*in fact* constitutes a second punishment." *Id.* at 449-50. Consequently, the Court concluded "recourse to statutory language structure, and intent . . . is not well suited to the context of the 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments." 490 U.S. at 447.

Contrary to the Ninth Circuit decision below, *Austin* did not reverse the *Halper* approach by adopting a categorical approach to punishment or by creating a strong presumption about the purposes of all forfeiture statutes. In *Austin,* the Court recognized the individualized nature of the *Halper* inquiry under the Double Jeopardy Clause, 113 S. Ct. 2801, 2812 n. 14, but addressed an entirely different, threshold constitutional issue -- whether 21 U.S.C. §§ 881 (a) (4) and (a)(7) qualified as a "fine" under the Excessive Fines Clause of the Eighth Amendment. 113 S. Ct. 2801, 2803. Since that amendment only prohibits *excessive* fines, the inquiry was understood to be only the first step of the constitutional analysis. The Court noted that at this threshold stage:

> it appears to make little practical difference whether the Excessive Fines Clause applies to all forfeitures [under the statutes at issue] or only to those that cannot be characterized as purely remedial. The clause prohibits only the imposition of "excessive" fines, *and a fine that serves purely remedial purposes cannot be considered "excessive" in any event.*

113 S. Ct. 2801, 2812 n.14 (emphasis added). The Court thus remanded for the second stage of the constitutional inquiry: whether the particular "fine" at issue was "excessive," or

alternatively, "purely remedial" under the Eighth Amendment. *Id.* at 2812 n.14.[20]

Despite *Halper*'s clear command to evaluate double jeopardy claims on their facts, while noting that only "the rare case" will fail the test, the Ninth Circuit explicitly refused to apply a particularized analysis here. By failing to make a particularized assessment of the proceeds forfeiture here and relying instead on statutory language, structure and intent, the decision conflicts with *Halper*. The Ninth Circuit also erred in applying in a double jeopardy context the *Austin* threshold inquiry under the Eighth Amendment -- which has never been applied by this Court to double jeopardy challenges. In so doing, the Ninth Circuit invalidated a sanction which, as discussed *infra*, "*serves purely remedial purposes*" and under *Austin* should not have been invalidated because it "*cannot be considered 'excessive' in any event.*" The decision thus conflicts with both *Halper* and *Austin*.[21]

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[20] Any doubt about whether the *Halper*-style particularized analysis of double jeopardy claims survived *Austin* was dispelled in *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937 (1994), which upheld a Double Jeopardy challenge against a Montana drug tax. Although recognizing that the *Halper* test was ill-suited to the peculiarities of tax statutes -- which serve to raise revenue or deter conduct -- the Court reaffirmed *Halper*'s general understanding that double jeopardy protections are "intrinsically personal" and that therefore only "'the character of the actual sanctions' can substantiate a possible double jeopardy violation." 114 S. Ct. 1937, 1946 (citation omitted). Thus, the Ninth Circuit errs in suggesting that *Kurth Ranch* "applied *Austin*'s categorical approach." 56 F.3d 41, 42 .

[21] The decision also conflicts with the decisions of at least three other circuits that have engaged at least in the case-by-case inquiry of *Halper*. *See Tilley*, 18 F.3d 295, 298-99 (stating that under *Halper*, the court must consider whether "if, *in this particular case*, the amount of the proceeds forfeited was so great that it bore no rational relation to the

B. The Decision Below Articulated a Much Broader Definition of Punishment Than That Set Forth in the Holding of *Halper*.

According to Ninth Circuit, *Halper* held that "a sanction which is designed even in part to deter or punish will constitute punishment, regardless of whether it also has a remedial purpose." 33 F.3d 1210, 1219. The court relied on the following language from *Halper*: "[A] civil sanction that cannot be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* The Ninth Circuit, however, omitted the very next sentence, which was *Halper's* true holding:

> We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but *only* as a deterrent or retribution.

490 U.S. at 448-49 (emphasis added). That is, a second sanction is invalid if it can "*only*" be characterized as a deterrent or retribution and has no remedial function. This definition of punishment was reiterated in this Court's

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costs incurred by the government.") (emphasis added); *United States v. Hudson*, 14 F.3d 536, 543 (10th Cir. 1994) (remanding a Double Jeopardy challenge for determination of whether the fines imposed by the Office of the Comptroller of Currency "in fact" were a remedy for the government's injury); *United States v. Barnette*, 10 F.3d 1553, 1559-60 (11th Cir. 1994) (comparing the size of the restitution order with the government's actual loss resulting from the defendant's conduct.)

post-*Austin* decision squarely raising the issue of "punishment" under the Double Jeopardy Clause. *See Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1945 (1994) (quoting only the holding of *Halper* without reference to the dicta upon which the Ninth Circuit relies).[22]

The Ninth Circuit justifies its rejection of *Halper's* true holding by noting that *Austin* took the same approach. 33 F.3d at 1210, 1219. Because *Austin* posed a different constitutional question, it does not support the Ninth Circuit's departure from *Halper* and *Kurth Ranch* or its award of a sweeping remedy -- barring the civil forfeiture action entirely -- beyond that ever authorized by this Court.

IV. Civil Forfeiture of Proceeds Does Not Constitute Punishment Under the Double Jeopardy Clause.

A. *Austin* Recognized That Certain Civil Forfeitures Are Generally Remedial.

Although the Ninth Circuit interpreted *Austin* as creating a strong presumption that all civil forfeitures are punitive in nature, *Austin* actually acknowledged the opposite: some types

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[22] The Court stated: "[in *Halper*] we held that 'a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.'" *Kurth Ranch*, 114 S. Ct. 1937, 1945 (citation omitted). *Cf. Id.* at 1952 (Rehnquist, C.J., concurring) (inquiring whether a sanction "can only be explained as serving a punitive purpose"); *id.* at 1953 (O'Connor, J., concurring) (examining "the extent [to which] the [civil] sanction serves only the purposes of retribution and deterrence as opposed to furthering any non-punitive objective").

of civil forfeiture are remedial and thus fall outside of the Double Jeopardy Clause. The Court cited the forfeitures at issue in *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984) (contraband firearms) and *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972) (undeclared imported merchandise) as examples of "cases where the forfeiture could properly be characterized as remedial." 113 S. Ct. 2801, 2805 n.4. In these cases, the Court acknowledged, "[t]he Double Jeopardy Clause has been held not to apply." *Id.* The forfeiture of contraband guns in *89 Firearms*, the Court reasoned, "may be characterized as remedial because it removes dangerous or illegal items from society." 113 S. Ct. 2801, 2811. The forfeiture of undeclared merchandise in *One Lot Emerald Cut Stones* was upheld, the Court noted, because it represented "a reasonable form of liquidated damages" to compensate the government for the costs incurred in investigating and prosecuting the case. *Id.*

The civil forfeitures upheld in *89 Firearms* and *One Lot Emerald Stones* not only survived *Austin* but also illustrate at least some of the types of civil forfeiture that generally do not qualify as "punishment" and require no further constitutional scrutiny. While not suggesting that its list of remedial forfeitures was exhaustive, *Austin* did establish that at least if the civil forfeitures remove dangerous or illegal items from society or serve as a reasonable form of liquidated damages for the government's costs, they are remedial and therefore are not "punishment" for purposes of the Double Jeopardy Clause.

B. Forfeiture of Criminal Proceeds Is Remedial and Beyond the Scope of the Double Jeopardy Clause.

Forfeiture of illegal proceeds resembles forfeiture of contraband in one important respect -- both remove dangerous items from society. Allowing large sums of money to remain

in the hands of drug dealers poses an immediate public safety risk because the currency generally is used to fund future purchases of illegal drugs for resale in future drug transactions. On a national scale, removing drug proceeds from drug offenders inhibits the expansion of the market for illegal drugs and thereby eliminates a serious threat to public safety. The forfeiture of proceeds thus may be characterized as "remedial" under *Austin* because it "removes dangerous . . . items from society." 113 S. Ct. 2801, 2811.[23]

Proceeds forfeiture also resembles the forfeiture of contraband in another way: in both cases the offender has no lawful right to the property. Since drug proceeds are obtained through illegal drug trafficking, the drug offender has no valid property interest in them. This Court's ruling in *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989) (upholding a civil forfeiture under the proceeds forfeiture provision of the Continuing Criminal Enterprise statute) is premised on lack of any property right: although the proceeds in *Caplin* were intended to pay for the defendant's attorney, the Court found that a criminal defendant "has no Sixth Amendment right to spend another person's money for attorney's fees." *Id.* at 626. Drug proceeds, the Court reasoned, resemble funds that a robbery suspect stole from a bank: in both cases, "[t]he money, though in [the defendant's] possession, is not rightfully his" and the government thus does not violate his rights if it seizes the proceeds. *Id. Cf. Rex Trailer Co. v. United States*, 350 U.S. 148, 153 n. 6 (1955) (characterizing illegal proceeds as "unjust enrichment" and "unfair gain.")

If a drug trafficker has no right to use drug proceeds for attorney's fees, it is because, like a bank robber, he has no right

[23] The amici states also support the argument that instrumentality forfeitures, such as that invalidated in *Ursery*, are also remedial and thus not punishment under the Double Jeopardy Clause.

to the money in the first place. The proceeds of drug transactions are not the legitimate property of the offender, and he thus has no reasonable expectation that the law will protect, or even allow, his continued possession of them. When the government seizes illegal drug proceeds, therefore, it is hardly punishing the offender, since it is not depriving him of any protected property interests. Consequently, the forfeiture of illegal drug proceeds, instead of punishing the forfeiting party, merely returns him to the position he enjoyed before his illegal activities began.[24]

Drugs are contraband and clearly forfeitable. Drug proceeds are acquired by illegally selling this contraband. The only difference between contraband drugs and drug proceeds is an intervening illegal event. Accordingly, just as a defendant deprived of contraband in a civil forfeiture proceeding does not suffer "punishment,"[25] the forfeiture of proceeds does not constitute "punishment" under the Double Jeopardy Clause. The contrary position, adopted by the decision below, leads to the absurd result that a defendant who possesses contraband

[24] *See U.S. v. Tilley*, 18 F.3d 295, 300; *SEC v. Bilzerian*, 29 F.3d 689, 696 (because the disgorgement order required forfeiture of no more than "ill-gotten gains," the order was remedial in nature and beyond the scope of the Double Jeopardy Clause.); *see also United States v. Alexander*, 32 F.3d 1231, 1236 (8th Cir. 1994) ("Forfeiture of proceeds cannot be considered punishment, . . . since it simply parts the owner from the fruits of the criminal activity.").

[25] The forfeiture of drug proceeds also will always be directly proportional to the amount of drugs sold. *Tilley*, 18 F. 3d 295, 300. They thus will always have a direct relationship to the underlying drug offense. *See Austin*, 113 S. Ct. 2801, 2815 (Scalia, J., concurring). In addition, as in *One Lot Emerald Cut Stones*, proceeds may often qualify as "a reasonable form of liquidated damages" for the costs of investigation and prosecution. *E.g., Tilley*, 18 F. 3d 295, 300.

may be subjected to both criminal punishment and civil forfeiture but by engaging in the further illegal sale of the contraband, he has put himself beyond the scope of the civil forfeiture laws.

CONCLUSION

The petition for certiorari should be granted.

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Date: October 2, 1995

Supreme Court, U.S.
FILED
FEB 23 1996
CLERK

Nos. 95-345 and 95-346

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER
v.
GUY JEROME URSERY

UNITED STATES OF AMERICA, PETITIONER
v.
FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH AND NINTH CIRCUITS

JOINT APPENDIX

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PETITIONS FOR WRIT OF CERTIORARI FILED AUGUST 28, 1995
CERTIORARI GRANTED JANUARY 2, 1996

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OCTOBER TERM, 1995

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
(FLINT)

CRIMINAL DOCKET FOR CASE #: 93-CR-50016-ALL

UNITED STATES OF AMERICA, PETITIONER

v.

GUY JEROME URSERY

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
2/5/93	1	INDICTMENT against GUY JEROME URSERY (1) count(s) 1 (1016) [Entry date 02/08/93]
3/1/93		INITIAL appearance by defendant GUY JEROME URSERY (1) count(s) 1 before Magistrate Judge Marc L. Goldman, set unsecured bond in the amount of $10,000.00 as to defendant GUY JEROME URSERY with conditions - D/Atty: Lawrence Emery - AUSA: Marlene Dayne - Tape # 93-5 (1050) [Entry date 03/02/93]
3/1/93		ARRAIGNMENT held as to defendant GUY JEROME URSERY, plea of not guilty entered - Magistrate Judge Marc L. Goldman - D/

DATE	NR	PROCEEDINGS
		Atty: Lawrence Emery - AUSA: Marlene Dayne - Tape #: 93-5 (1050) [Entry date 03/02/93]
3/1/93	2	APPEARANCE for defendant GUY JEROME URSERY of attorney Lawrence J. Emery and demand for Rule 16 disclosures (1016) [Entry date 03/09/93]
3/1/93	3	ACKNOWLEDGEMENT by defendant GUY JEROME URSERY of indictment [1-1] (1016) [Entry date 03/09/93]
3/1/93	4	ORDER by Magistrate Judge Marc L. Goldman, setting unsecured bond in the amount of $10,000.00 as to defendant GUY JEROME URSERY with conditions (1016) [Entry date 03/09/93]
3/1/93	5	BOND in the amount of $10,000.00 unsecured entered as to defendant GUY JEROME URSERY (1016) [Entry date 03/09/93]
3/2/93	6	STANDING ORDER for discovery and inspection and fixing motion cutoff date in criminal cases by Judge Stewart Newblatt with Proof of Mailing (1016) [Entry date 03/09/93]

DATE	NR	PROCEEDINGS
3/9/93	9	NOTICE of pretrial conference with proof of mailing (1016) [Entry date 03/17/93]
3/15/93	7	PROOF of mailing of Appearance and Demands for Rule 16 Disclosures (1016) [Entry date 03/17/93]
3/15/93	8	PROOF of mailing of Appearance and Demands for Rule 16 Disclosures (1016) [Entry date 03/17/93]
3/17/93	10	ORDER by Judge Stewart Newblatt, deadline for filing motions, plea, final pretrial conference, criminal jury trial (sched events were not done because prior to doing them the Order was amended and the sched events were done on the new dates) (1016) [Entry date 03/25/93]
3/18/93	10	ORDER by Judge Stewart Newblatt, deadline for filing motions, plea, final pretrial conference, criminal jury trial (1016) [Entry date 03/25/93]
3/18/93		SCHEDULE: by Judge Stewart Newblatt deadline for filing motions set for 4/2/93, plea set for 4/20/93 for GUY JEROME URSERY, final pretrial conference set for 1:30 4/20/93, criminal jury trial set for

DATE	NR	PROCEEDINGS
		8:00 5/5/93 for GUY JEROME URSERY (1016) [Entry date 03/25/93]
4/5/93	12	MOTION by defendant GUY JEROME URSERY to strike mandatory minimum sentence provision of 21 USC 841(b) with brief (1016) [Entry date 04/14/93]
4/5/93	13	MOTION by defendant GUY JEROME URSERY for disclosure of informant with brief (1016) [Entry date 04/14/93]
4/5/93	14	MOTION by defendant GUY JEROME URSERY for evidentiary hearing and to suppress evidence with brief (1016) [Entry date 04/14/93]
4/6/93	15	ORDER by Judge Stewart Newblatt striking motion to strike mandatory minimum sentence provision of 21 USC 841(b) by GUY JEROME URSERY [12-1] (1016) [Entry date 04/14/93]
4/6/93	15	ORDER by Judge Stewart Newblatt striking motion for disclosure of

DATE	NR	PROCEEDINGS
		informant by GUY JEROME URSERY [13-1] (1016) [Entry date 04/14/93]
4/6/93	15	ORDER by Judge Stewart Newblatt striking motion for evidentiary hearing by GUY JEROME URSERY [14-1], striking motion to suppress evidence by GUY JEROME URSERY [14-2] (1016) [Entry date 04/14/93]
4/12/93	16	MOTION by defendant GUY JEROME URSERY for evidentiary hearing and suppression of evidence with brief (1016) [Entry date 04/15/93]
4/12/93	17	MOTION by defendant GUY JEROME URSERY for disclosure of informant with brief (1016) [Entry date 04/15/93]
4/12/93	18	MOTION by defendant GUY JEROME URSERY to strike mandatory minimum sentence provision of 21:841(b) with brief (1016) [Entry date 04/15/93]
4/12/93	19	PROOF of mailing of motions by Defendant Ursery (1016) [Entry date 04/15/93]

DATE	NR	PROCEEDINGS
4/16/93	20	STIPULATION by defendant GUY JEROME URSERY, plaintiff USA for a continuance (1016) [Entry date 04/26/93]
4/19/93	21	ORDER by Judge Stewart Newblatt, deadline for response to motion to strike mandatory minimum sentence provision of 21:841(b) by GUY JEROME URSERY [18-1], motion for disclosure of informant by GUY JEROME URSERY [17-1], motion for evidentiary hearing by GUY JEROME URSERY [16-1], motion suppression of evidence by GUY JEROME URSERY [16-2], final pretrial conference, criminal jury trial (1016) [Entry date 04/26/93]
4/19/93		SCHEDULE: by Judge Stewart Newblatt deadline for response to motion to strike mandatory minimum sentence provision of 21:841(b) by GUY JEROME URSERY [18-1] set for 5/17/93, motion for disclosure of informant by GUY JEROME URSERY [17-1] set for 5/17/93, motion for evidentiary hearing by GUY JEROME URSERY [16-I] set for 5/17/93, motion suppression of evidence by GUY JEROME

DATE	NR	PROCEEDINGS
		URSERY [16-2] set for 5/17/93 (1016) [Entry date 04/26/93]
4/19/93		SCHEDULE: by Judge Stewart Newblatt final pretrial conference set for <date not set>, criminal jury trial set for 8:00 6/8/93 for GUY JEROME URSERY (1016) [Entry date 04/26/93]
4/19/93		EXCLUDABLE interval of type XT beginning 4/12/93 and ending 6/8/93 per order deadline for response to motion to strike mandatory minimum sentence provision of 21:841(b) by GUY JEROME URSERY [18-1], motion for disclosure of informant by GUY JEROME URSERY [17-1], motion for evidentiary hearing by GUY JEROME URSERY [16-1], motion suppression of evidence by GUY JEROME URSERY [16-2] [21-1] (1016) [Entry date 04/26/93]
4/30/93	22	MOTION by defendant GUY JEROME URSERY to adjourn trial with brief (1016) [Entry date 05/13/93]
4/30/93	23	ORDER by Judge Stewart Newblatt granting motion to adjourn trial by

DATE	NR	PROCEEDINGS
		GUY JEROME URSERY [22-1] (1016) [Entry date 05/13/93]
4/30/93		SCHEDULE: by Judge Stewart Newblatt criminal jury trial set for 8:00 6/21/93 for Guy Jerome Ursery, final pretrial conference set for 3:00 6/16/93 (1016) [Entry date 05/13/93]
5/3/93	24	PROOF of mailing of Motion to adjourn trial, Brief and Order (1016) [Entry date 05/13/93]
5/12/93	25	REQUEST by defendant Guy Jerome Ursery, plaintiff USA to continue trial until 6/25/93 (1016) [Entry date 05/13/93]
5/13/93		EXCLUDABLE interval of type XT4 beginning 6/8/93 and ending 6/21/93 per order [23-1] (1016) [Entry date 05/13/93]
5/17/93	26	ORDER by Judge Stewart Newblatt adjourning criminal jury trial and allowing excludable (1016) [Entry date 05/21/93]
5/17/93		SCHEDULE: by Judge Stewart Newblatt criminal jury trial set for 8:00 6/28/93 for Guy Jerome Ursery (1016) [Entry date 05/21/93]

DATE	NR	PROCEEDINGS
5/17/93		EXCLUDABLE interval of type XT4 beginning 6/8/93 and ending 6/21/93 per order criminal jury trial [26-1], order [26-2] (1016) [Entry date 05/21/93]
5/24/93	27	RESPONSE by plaintiff USA to motion for disclosure of informant by Guy Jerome Ursery [17-1] with brief (1016) [Entry date 05/25/93]
5/24/93	28	RESPONSE by plaintiff USA to motion for evidentiary hearing by Guy Jerome Ursery [16-1] with brief (1016) [Entry date 05/25/93]
5/24/93	29	RESPONSE by plaintiff USA to motion to strike mandatory minimum sentence provision of 21:841(b) by Guy Jerome Ursery [18-1] with brief (1016) [Entry date 05/25/93]
5/24/93	30	PROOF of mailing of Government's Responses to Motions with Briefs (1016) [Entry date 05/25/93]
6/7/93	31	PROPOSED JURY instructions filed by plaintiff USA (1016) [Entry date 06/08/93]
6/15/93	32	REPLY by defendant Guy Jerome Ursery to motion response by USA

DATE	NR	PROCEEDINGS
		[28-1] with Affidavit and Proof of Mailing (1016) [Entry date 06/21/93]
6/16/93	33	MOTION by plaintiff USA to modify bond as to defendant Guy Jerome Ursery with proof of mailing (1016) [Entry date 06/22/93]
6/16/93	34	ORDER by Judge Stewart Newblatt granting motion to modify bond as to defendant Guy Jerome Ursery by USA [33-1] (1016) [Entry date 06/22/93]
6/16/93	35	ORDER by Judge Stewart Newblatt, setting unsecured bond in the amount of $10,000.00 as to defendant Guy Jerome Ursery with conditions (1016) [Entry date 06/22/93]
6/16/93		MOTION hearing held as to defendant Guy Jerome Ursery on motion for evidentiary hearing by Guy Jerome Ursery [16-1], motion suppression of evidence by Guy Jerome Ursery [16-2] disposition: denied - Judge Stewart Newblatt - Court Reporter: Sprague (1016) [Entry date 06/22/93]

DATE	NR	PROCEEDINGS
6/18/93	36	GOVERNMENT's proposed WITNESS list by plaintiff USA (1016) [Entry date 06/22/93]
6/18/93	37	PROPOSED EXHIBIT list by plaintiff USA (1016) [Entry date 06/22/93]
6/21/93	38	NOTICE by defendant Guy Jerome Ursery of objection to foundation for government exhibits with proof of mailing (1016) [Entry date 06/24/93]
6/21/93	39	ORDER by Judge Stewart Newblatt granting motion to modify bond as to defendant Guy Jerome Ursery by USA [33-1], criminal jury trial (1016) [Entry date 06/25/93]
6/24/93	39	ORDER by Judge Stewart Newblatt denying motion to strike mandatory minimum sentence provision of 21:841(b) by Guy Jerome Ursery [18-1] denying motion for evidentiary hearing by Guy Jerome Ursery [16-1], denying motion suppression of evidence by Guy Jerome Ursery [16-2] mooting motion for disclosure of informant by Guy Jerome Ursery [17-1] (1016) [Entry date 06/25/93]

DATE	NR	PROCEEDINGS
6/25/93	40	ORDER by Judge Stewart Newblatt, reassigning case from Judge Stewart Newblatt to Judge Avern Cohn for the purpose of conducting trial proceedings and any other related matters. (1043) [Entry date 06/28/93]
6/29/93	41	WITNESS list by defendant Guy Jerome Ursery (1043) [Entry date 06/30/93]
6/29/93	42	EXHIBIT list by defendant Guy Jerome Ursery (1043) [Entry date 06/30/93]
6/29/93	3	JURY instructions (requested) filed by defendant Guy Jerome Ursery (1043) [Entry date 06/30/93]
6/29/93		VOIR DIRE begun and continued to 9:00 6/30/93 before Judge Avern Cohn - Court Reporter: Herman Tappert (1164) [Entry date 07/01/93]
6/30/93		VOIR DIRE concluded before Judge Avern Cohn - Court Reporter: Herman Tappert (1164) [Entry date 07/01/93]
6/30/93		JURY impanelment held before Judge Avern Cohn -Court Reporter:

DATE	NR	PROCEEDINGS
		Herman Tappert (1164) [Entry date 07/01/93]
6/30/93		CRIMINAL jury trial begun and continued to 9:00 7/1/93 for Guy Jerome Ursery - Judge Avern Cohn - Court Reporter: Herman Tappert (1164) [Entry date 07/01/93]
7/1/93		CRIMINAL jury trial held and continued to 7/2/93 for Guy Jerome Ursery - Judge Avern Cohn - Court Reporter: Herman Tappert (1079) [Entry date 07/07/93]
7/2/93		CRIMINAL jury trial concluded - Judge Avern Cohn - Court Reporter: Herman Tappert (1053) [Entry date 01/27/94]
7/2/93		JURY verdict, of guilty entered as to Guy Jerome Ursery (1) count(s) 1, defendant Guy Jerome Ursery referred to probation - Judge Avern Cohn - Court Reporter: Herman Tappert (1053) [Entry date 01/27/94]
7/7/93	44	VERDICT form as to defendant Guy Jerome Ursery (1043) [Entry date 07/08/93]
7/9/93	45	MOTION by defendant Guy Jerome Ursery for new trial with exhibits,

DATE	NR	PROCEEDINGS
		brief, and proof of mailing. (1043) [Entry date 07/13/93]
7/15/93	46	MOTION by defendant Guy Jerome Ursery for dismissal of the case with brief and proof of mailing. (1043) [Entry date 07/19/93]
7/20/93	47	RESPONSE by plaintiff USA to motion for new trial by Guy Jerome Ursery [45-1] with brief, exhibits, and proof of mailing. (1043) [Entry date 07/26/93]
7/30/93	48	STIPULATION and order by Judge Avern Cohn, allowing the USA additional time to respond to motion for dismissal of the case by Guy Jerome Ursery [46-1] (1043) [Entry date 08/03/93]
7/30/93		SCHEDULE: by Judge Avern Cohn deadline for response to motion for dismissal of the case by Guy Jerome Ursery [46-1] extended to 8/27/93 (1079) [Entry date 08/04/93]
8/25/93	49	RESPONSE by plaintiff USA to motion for dismissal of the case by Guy Jerome Ursery [46-1] with brief, exhibits, and proof of mailing. (1043) [Entry date 08/30/93]

DATE	NR	PROCEEDINGS
9/14/93	50	MEMORANDUM and order by Judge Avern Cohn denying motion for dismissal (judgment of acquittal) of the case by Guy Jerome Ursery [46-1], denying motion for new trial by Guy Jerome Ursery [45-1] with proof of mailing. (1043) [Entry date 09/16/93]
11/2/93	51	MEMORANDUM by plaintiff USA in support of Probation Department's adjustment in presentence report for possession of firearm as to defendant Guy Jerome Ursery with brief and proof of mailing. (1043) [Entry date 11/08/93]
1/19/94		SENTENCING held - Judge Avern Cohn -D/Atty: L. Emery - AUSA: M. Dayne- Court Reporter: Herman Tappert (1109) [Entry date 01/20/94]
1/19/94	52	JUDGMENT and commitment order entered by Judge Avern Cohn sentencing Guy Jerome Ursery (1) count(s) 1. (time stamped 1/20/94) (1043) [Entry date 01/27/94]
1/31/94	53	MOTION by defendant Guy Jerome Ursery for bond pending appeal with brief and proof of mailing. (1043) [Entry date 02/01/94]

DATE	NR	PROCEEDINGS
1/31/94	54	APPEAL by defendant Guy Jerome Ursery of judgment [52-2] to USCA - FEE: not paid (1045) [Entry date 02/01/94]
1/31/94	57	REQUEST by defendant Guy Jerome Ursery for transcripts of trial and pretrial motions (1045) [Entry date 02/01/94]
2/1/94	55	PROOF of mailing of notice of appeal to USCA, Lawrence J. Emery, Robert Haviland, Patricia Blake and Herman Tappert (1045) [Entry date 02/01/94]
2/1/94	56	CERTIFIED copy of appeal notice by Guy Jerome Ursery [54-1] and docket transmitted to USCA (1045) [Entry date 02/01/94]
2/9/94	58	RESPONSE by plaintiff USA to motion for bond pending appeal by Guy Jerome Ursery [53-1] with brief, attachment, and proof of mailing. (1043) [Entry date 02/15/94]
2/15/94	59	NOTICE of hearing on motion for bond pending appeal by Guy Jerome Ursery [53-1] set before Judge Cohn. (1043) [Entry date 02/16/94]

DATE	NR	PROCEEDINGS
2/15/94	60	ORDER by Judge Avern Cohn as to defendant Guy Jerome Ursery, extending time to surrender to institution. (1043) [Entry date 02/16/94]
2/15/94		SCHEDULE: by Judge Avern Cohn as to defendant Guy Jerome Ursery hearing on motion for bond pending appeal by Guy Jerome Ursery [53-1] set for 3:30 3/2/94 for Guy Jerome Ursery (1109) [Entry date 02/16/94]
2/18/94	61	TRANSCRIPT order form by defendant Guy Jerome Ursery requesting transcripts of: 6/16/93 before Judge Newblatt, court reporter Sprague and 6/29/93 - 7/2/93 before Judge Cohn, court reporter Tappert. All witnesses and entire trial transcript including judge's rulings on motions, objections; and rulings on jury instructions. -appeal case # 94-1127 (1043) [Entry date 02/28/94]
2/18/94	62	DESIGNATION of record by defendant Guy Jerome Ursery - appeal case # 94-1127 (1043) [Entry date 02/28/94]

DATE	NR	PROCEEDINGS
2/23/94	63	ACKNOWLEDGEMENT from USCA, via copy of transmission form, of receipt of appeal notice by Guy Jerome Ursery [54-1] (stamped received by USCA 2/7/94 and stamped filed by USCA 2/11/94) - appeal case # 94-1127 (1043) [Entry date 03/03/94]
2/25/94	64	FEE payment received from defendant Guy Jerome Ursery for appeal notice by Guy Jerome Ursery [54-1] in the amount of $105.00 - Receipt # 200 301506 - appeal case # 94-112 7. (2/28/94 - USCA notified by E-Mail) (1043) [Entry date 03/03/94]
3/2/9465		APPLICATION and order by Judge Avern Cohn for defendant Guy Jerome Ursery to proceed in forma pauperis regarding appeal filed 1/31/94. (#94-1127) (1043) [Entry date 03/03/94]
3/2/94		MOTION hearing held as to defendant Guy Jerome Ursery on motion for bond pending appeal by Guy Jerome Ursery [53-1] - disposition: GRANTED - Judge Avern Cohn - Court Reporter: Denise Mosby (1164) [Entry date 03/28/94]

DATE	NR	PROCEEDINGS
3/18/94		ATTORNEY added for Guy Jerome Ursery - by Order of the Court of Appeals (1016) [Entry date 03/31/94]
3/18/94	67	ORDER as to defendant Guy Jerome Ursery by the Court of Appeals appointment Lawrence J. Emery as counsel for appellant (1016) [Entry date 03/31/94]
3/21/94	66	ORDER by Judge Avern Cohn granting motion for bond pending appeal by Guy Jerome Ursery [53-1] (1043) [Entry date 03/22/94]
4/11/94	68	TRANSCRIPT of jury trial proceedings (Volume I) as to defendant Guy Jerome Ursery taken on 6/30/93 before Judge Cohn. (1043) [Entry date 04/14/94]
4/11/94	69	TRANSCRIPT of jury trial proceedings (Volume II) as to defendant Guy Jerome Ursery taken on 7/1/93 before Judge Cohn. (1043) [Entry date 04/14/94]
4/11/94	70	TRANSCRIPT of jury trial proceedings (Volume III) as to defendant Guy Jerome Ursery taken on 7/2/93 before Judge Cohn. (1043) [Entry date 04/14/94]

DATE	NR	PROCEEDINGS
4/11/94	71	TRANSCRIPT of sentence proceedings as to defendant Guy Jerome Ursery taken on 1/19/94 before Judge Cohn. (1043) [Entry date 04/14/94]
5/18/94	72	TRANSCRIPT of motions proceedings as to defendant Guy Jerome Ursery and before Judge Stewart Newblatt taken on 6/16/93 (1043) [Entry date 05/27/94]
6/2/94	74	AUTHORIZATION and voucher for payment of transcript to Lightning Recording Service in the amount of $63.00 as to defendant Ursery. (1043) [Entry date 06/30/94]
6/2/94	75	AUTHORIZATION and voucher for payment of transcript to Herman Tappert, court reporter, in the amount of $1,149.00. (1043) [Entry date 06/30/94]
6/6/94	73	TRANSCRIPT of motion for bond pending appeal proceedings as to defendant Guy Jerome Ursery taken on 3/2/94 before Judge Cohn. (1043) [Entry date 06/07/94]

DATE	NR	PROCEEDINGS
7/18/94	76	MOTION by defendant Guy Jerome Ursery to supplement record for appeal with brief, copies of exhibits, and proof of mailing. (1043) [Entry date 07/20/94]
7/18/94	77	ORDER by Judge Avern Cohn granting motion to supplement record for appeal by Guy Jerome Ursery [76-1]. (The District Court Clerk is directed to certify and transmit to the Court of Appeals for the Sixth Circuit the court file in USA -v- Certain Real Property located at 1700 Braden Road, file no. 92-cv-75843. The trial exhibits attached to the defendant's motion and a photograph of the goverment's, the defendant's motion and a photograph of government's exhibit 13 are to be made a part of the record for exhibit 13 are to be make a part of the record for transmittal.) (1043) [Entry date 07/20/94]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
(DETROIT)

CIVIL DOCKET FOR CASE #: 92-CV-75843

UNITED STATES OF AMERICA

v.

REAL PROPERTY LOCATED AT 1700 BRADEN ROAD

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
9/30/92		Magistrate Judge Lynn V. Hooe Jr. (1065) [Entry date 10/01/92]
9/30/92	1	COMPLAINT for forfeiture, with WI (1052) [Entry date 10/02/92]
10/1/92	2	WARRANT for search and seizure issued as to 1700 Braden Road with attached application and affidavit. (1052) [Entry date 10/02/92]
10/7/92	3	CLAIM by Guy J. Ursery, Cynthia K. Ursery with proof of mailing. (1052) (Entry date 10/08/92]
10/8/92	4	WARRANT for search and seizure executed by Marshal on 10/2/92 as to

DATE	NR	PROCEEDINGS
		1700 Braden Road (1052) [Entry date 10/13/92]
10/23/92	5	ANSWER by claimant Guy J. Ursery, claimant Cynthia K. Ursery to complaint [1-1] jury demand and with proof of mailing. (1052) [Entry date 10/26/92]
10/27/92	6	SUMMONS returned executed by US Marshal on 10/2/92 as to defendant RP 1700 Braden Road - answer due 10/22/92 for RP 1700 Braden Road (1052) [Entry date 10/30/92]
10/30/9	27	PRETRIAL scheduling order by Judge Lawrence P. Zatkoff (1052) [Entry date 11/02/92]
11/3/92		SCHEDULE: by Judge Lawrence P. Zatkoff scheduling conference set for 2:30 11/9/92 (1089)
11/13/92	8	PRETRIAL scheduling order by Judge Lawrence P. Zatkoff (1054) [Entry date 11/16/92]

DATE	NR	PROCEEDINGS
11/16/92		SCHEDULE: by Judge Lawrence P. Zatkoff deadline for interrogatories set for 12/21/92, deadline for filing motions set for 1/25/93, deadline for expert witness list set for 2/1/93, deadline for discovery set for 2/15/93, deadline for filing dispositive motions set for 3/8/93, deadline for final pretrial order set for 6/14/93, final pretrial conference set for 2:00 6/14/93, civil jury trial set for 8:30 7/1/93 (1089)
11/18/92	9	AFFIDAVIT of publication of complaint on 11/12/92 (1052) [Entry date 11/19/92]
12/10/92	10	ANSWER by claimant NBD Mtg Co to complaint [1-1] with exhibits (1052) [Entry date 12/11/92]
12/10/92	10	AFFIRMATIVE defenses by claimant NBD Mtg Co (1052) [Entry date 12/11/92]
12/10/92	11	APPEARANCE for claimant NBD Mtg Co of attorney Steven I. Alpert with notice. (1052) [Entry date 12/11/92]
12/10/92	12	PROOF of mailing of pleadings #10 & 11. (1052) [Entry date 12/11/92]

DATE	NR	PROCEEDINGS
12/11/92	13	CLAIM of interest by claimant NBD Mtg Co, with exhibits, verification, and proof of mailing. (1024) [Entry date 12/14/92]
12/15/92	14	PROOF of mailing of interrogatories. (1052) [Entry date 12/16/92]
1/26/93	15	MOTION by claimant Guy J. Ursery, claimant Cynthia K. Ursery to compel discovery with brief, exhibits and proof of mailing. (1052) [Entry date 01/27/93]
2/1/93	16	WITNESS list by plaintiff USA (1052) [Entry date 02/02/93]
2/11/93	17	ORDER by Judge Lawrence P. Zatkoff granting motion to compel discovery by Cynthia K. Ursery, Guy J. Ursery [15-1] with proof of mailing. (1052) [Entry date 02/02/93]
2/2/93	18	PROOF of mailing of plaintiff's witness list and answer to request. (1052) [Entry date 02/03/93]
2/2/93	19	TRIAL WITNESS list by claimant NBD Mtg Co with proof of mailing. (1052) [Entry date 02/03/93]

DATE	NR	PROCEEDINGS
2/4/93	20	WITNESS list by claimants Guy J. Ursery and Cynthia K. Ursery with proof of mailing. (1052) [Entry date 02/05/93]
2/19/93	21	STIPULATION and order by Judge Lawrence P. Zatkoff extending discovery date. (1052) [Entry date 02/22/93]
3/10/93	22	MOTION by claimants Guy and Cindy Ursery for evidentiary hearing, to dismiss with brief, attachments and proof of mailing. (1052) [Entry date 03/11/93]
3/22/93	23	NOTICE by claimants of hearing on motion for evidentiary hearing [22-1], motion to dismiss [22-2] with proof of mailing. (1052) [Entry date 03/23/93]
3/23/93	24	RESPONSE by plaintiff USA to motion for evidentiary hearing by Cynthia K. Ursery, Guy J. Ursery [22-1], motion to dismiss by Cynthia K. Ursery, Guy J. Ursery [22-2] with brief, and attachment (1024) [Entry date 03/24/93]
3/24/93	25	PROOF of mailing of answer to claimants' motion for evidentiary hearing. (1052) [Entry date 03/25/93]

DATE	NR	PROCEEDINGS
3/26/93	26	RE-NOTICE by claimants of hearing on motion for evidentiary hearing [22-1], motion to dismiss [22-2] with proof of mailing. (1052) [Entry date 03/29/93]
4/22/93	27	STIPULATED expedited SETTLEMENT agreement (1052) [Entry date 04/23/93]
4/30/93	28	PROOF of mailing of Expedited Settlement Agreement (1052) [Entry date 05/03/93]
5/24/93	29	CONSENT judgment entered by Judge Lawrence P. Zatkoff for USA against Guy J. Ursery, Cynthia K. Ursery for $13,250.00. (1118) [Entry date 05/25/93]
8/26/93	30	PROOF of mailing of consent judgment of forfeiture (1044)
11/22/94		RECORD consisting of: 1 volume(s) of pleadings 0 transcript(s) 0 deposition(s) transmitted to USCA - record sent per order of 7/18/94 in case 4:93cr50016 (#77) (1142) [Edit date 11/22/94]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 93-50016
HON. STEWART A. NEWBLATT
UNITED STATES OF AMERICA, PLAINTIFF
v.
GUY JEROME URSERY, DEFENDANT

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

(manufacture of marihuana)
(21 U.S.C. §841(a)(1)

That on or about July 30, 1992, in the Eastern District of Michigan, GUY JEROME URSERY did knowingly and intentionally manufacture marihuana, a schedule I controlled substance; in violation of Title 21, United States Code, Section 841(a)(1).

THIS IS A TRUE BILL.

Dated: 2-5-93

/s/ JANET J. SULZ
JANET J. SULZ
FOREPERSON

STEPHEN J. MARKMAN
UNITED STATES ATTORNEY

/s/ ROBERT W. HAVILAND
ROBERT W. HAVILAND
(P25665)
Asst. U.S. Attorney-in-Charge

/s/ MARLENE DAYNE
MARLENE DAYNE
(P33973)
Assistant U. S. Attorney
600 Church St.,
Room 210
Flint, MI 48502

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - FLINT

CRIMINAL ACTION NO: 93-CR-50016-FL
UNITED STATES OF AMERICA, PLAINTIFF
v.
GUY JEROME URSEY, DEFENDANT

AMENDED SCHEDULING ORDER

At a preliminary hearing of the above-captioned matter held with the law clerk and all the parties, certain dates were set pursuant to the Speedy Trial Act, 18 U.S.C. § 3161. IT IS HEREBY ORDERED that the parties shall comply with the following dates:

Motion cutoff date:	April 2, 1993.
Plea cutoff date:	April 20, 1993.
Final pretrial date:	April 20, 1993; 1:30 p.m.
Jury trial date:	May 5, 1993; 8:00 a.m.

SO ORDERED.

Date: 3/18/93

/s/ STEWART A. NEWBLATT
STEWART A. NEWBLATT
United States District Judge

CERTIFICATION OF SERVICE

UNITED STATES OF AMERICA
EASTERN DISTRICT OF MICHIGAN

CASE NO: 93-50016

I, the undersigned, hereby certify that I have on the 18th day of March, 1993, mailed a copy of the AMENDED SCHEDULING ORDER in the foregoing cause, pursuant to Rule 77(d), Fed.R.Civ.P., to the following persons at the addresses given:

Marlene Dayne
Assistant U.S. Attorney
206 Federal Building
600 Church Street
Flint, MI 48502

Lawrence J. Emery, Esq.
3401 E. Saginaw
Suite 104
Lansing, MI 48912-4730

/s/ COLETTE J. LEHOUX
COLETTE J. LEHOUX, Secretary
to Stewart A. Newblatt
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 92 CV 75843
HONORABLE LAWRENCE P. ZATKOFF

UNITED STATES OF AMERICA, PLAINTIFF(S)

v.

REAL PROPERTY LOCATED AT 1700
BRADEN ROAD, ET AL., DEFENDANT(S)

SCHEDULING ORDER FOR THE PURPOSE OF:

(1) Scheduling future proceedings;

(2) Establishing deadlines and cut-off dates for discovery procedures, amendments to pleadings and joining parties;

(3) Modifying motion practice; and

(4) Referring certain pretrial matters to United States Magistrate Judge.

COUNSEL ARE ADVISED THAT IT IS THE POLICY OF THE COURT TO ENFORCE THE DEADLINES AND CUT-OFF DATES SET FORTH IN THIS SCHEDULING ORDER PURSUANT TO RULE 16(F), FEDERAL RULES OF CIVIL PROCEDURE.

SPECIAL NOTICE: Pursuant to Rule 16(b), Federal Rules of Civil Procedure, requests for modification of this Scheduling Order must be submitted in writing by mail to the Court within 14 days from the date of this Scheduling Order.

Pursuant to the Federal Rules of Civil Procedure, the Court enters the following schedule controlling the progress of the above-entitled cause:

IT IS ORDERED:

1. The deadline date for serving first set of interrogatories and/or requests for production of documents to a party, pursuant to Rules 33 and 34, Fedeal Rules of Civil Procedure is 12-21-92.

2. The deadline date for filing motions to compel with respect to such interrogatories and/or requests for production of documents to a party pursuant to Rule 37(a), Federal Rules of Civil Procedure, is 1-25-93.

3. Parties are ORDERED to exchange complete trial witness lists on or before 2-1-93 and file a proof of service. NO WITNESS MAY BE CALLED FOR TRIAL UNLESS THAT WITNESS'S NAME AND ADDRESS IS LISTED, unless the Court rules, prior to trial, that there was good cause for failing to list such witness.

4. Case will be referred to Mediation Tribunal: n/a.

5. The discovery cut-off is 2-15-93. ALL DISCOVERY SHALL BE INITIATED WELL IN ADVANCE OF THE DISCOVERY CUT-OFF DATE. MOTIONS TO COMPEL, IF NECESSARY, MUST BE FILED AND HEARD BEFORE THE DISCOVERY CUT-OFF DATE.

6. Dispositive motions (summary judgment, etc.) if any, shall be filed by 3-8-93. (See comment below on motion practice.)

7. Motions in limine must be filed with the Court before the pretrial/settlement conference date. No motions in limine will be heard on day of trial.

8. The proposed pretrial order shall be submitted to the Judge's Chambers by 6-14-93. Instructions are attached. FAILURE TO SUBMIT A TIMELY PRETRAIL ORDER WILL RESULT IN THE ISSUANCE OF SANCTIONS.

9. FINAL PRETRIAL/SETTLEMENT CONFERENCE IS SCHEDULED FOR 6-14-93 AT 2:00 p.m. TRIAL COUNSEL MUST BE PRESENT, AS WELL AS THE CLIENTS AND/OR THOSE WITH FULL AUTHORITY TO ENGAGE IN SETTLEMENT NEGOTIATIONS.

10. JOINT jury instructions for jury cases, or individual proposed findings of act and conclusions of law for non-jury cases, must be submitted to the Court on the first day of trial. Trial briefs must be submitted at least 3 days before trial. (See Local Court Rule 39.2)

11. Parties are to exchange copies of all exhibits, or divulge and permit an opportunity to review exhibits not capable of being copied, at least 20 days prior to the month in which the case is scheduled for trial.

All proposed exhibits are to be jointly pre-marked and indexed.

In jury cases, the Court shall be furnished with a copy of all proposed documentary exhibits IN BINDERS with a typed index. In non-jury cases, the Court shall be furnished with two (2) copies of all proposed documentary exhibits IN BINDERS and two (2) typed indexes.

12. All depositions shall be edited prior to the Final Pretrial/Settlement Conference date. The Court will not hear any motions or objections regarding the content of depositions after the Final Pretrial/Settlement Conference.

13. The case is assigned for Jury trial on the Court's trailing docket for July, 1993.

14. When each attorney for each party in any suit desires an early trial date and will dispatch all pretrial motions, this Court will assure the earliest open date for trial. Call Ms. Thebolt, Court Clerk at (313) 226-3714.

QUESTIONS CONCERNING THIS SCHEDULING ORDER SHOULD BE DIRECTED TO THE COURT'S COURTROOM DEPUTY CLERK, BERNADETTE THEBOLT, AT 226-3714.

MOTION PRACTICE

Counsel are expected to comply with Rule 7.1, Local Rules of this Court, including the requiring of filling responses and briefs with Ten (10) days after service of motion.

Oral arguments on motions will not be held unless, upon consideration, the Court so orders. If the Court does order oral argument, reasonable notice of a date and time will be given to all counsel. E.D. Mich. Local R. 7.1(e)(2).

Date: Nov. 13, 1992 /s/ LAWRENCE P. ZATKOFF
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

NOTICE TO:

Joyce F. Todd, AUSA

Lawrence J. Emery, Esq.,

STATE OF MICHIGAN
JUDICIAL DISTRICT

POLICE AGENCY REPORT NUMBER: 7-3036-92
AFFIDAVIT FOR SEARCH WARRANT

Thomas B. Feahr, Affiant(s), state(s) that:

1. The person, place or thing to be searched is described as and is located at:

A one story, brown wood sided ranch style home with attached garage and all outbuildings and vehicles located at 1700 Braden Rd., Perry, MI 48872 and further described as the first residence on the south side of Braden Rd., just east of State Rd., section 32 of Antrim Twp., Shiawassee County.

2. The PROPERTY to be searched for and seized, if found, is specifically described as:

All evidence of narcotics and narcotics trafficking including any items recognizable as narcotics or suspected of being same, any records suspected of being related to narcotics trafficking, records establishing residency, control or ownership of premises, any currency believed to be the proceeds of drug transactions, firearms or weapons used to protect the controlled substances or the proceeds from the sale of the controlled substances, any drug paraphernalia, any utility and telephone records, and any items used for manufacturing marijuana or other illegal drugs.

3. The FACTS establishing probable cause or the grounds for search are:

A. Affiant is a Detective/Trooper with the Michigan state police and has been a police officer for over five years. Affiant has been assigned Criminal Investigation Division to investigate illegal narcotic trfficking in the Shiawassee County area for over one year. Affiant has extensive specialized training in the area of enforcement.

B. Affiant was contacted by Officer Chester Farrier of Morrice Police Dept. Farrier advised Affiant that he has a informant that has been proven reliable. Farrier advised Affiant the informant told him the following:

1. A person named Guy Ursery resides at 1700 Braden Rd., Perry and he has a son named Brian Ursery.

2. Informant has known Guy Ursery for several years.

3. Informant has personally observed that Guy Ursery grows marijuana on his property that the residence occupies.

This affidavit consist of 2 pages. /S/ D/trr/ THOMAS (illegible)
Affiant

Reviewed on [July 29, 1992]
Date

Subscribed and sworn to before me on [7-29-92]
Date

by: DEANA M. FINNEGAN
Prosecuting Official

BART J. BARNES
Judge/Magistrate

4. Informant stated that Ursery first starts marijuana seedlings in a chicken coop and then transplants the immature plants on his property.

5. That Ursery dries marijuana on a woodpile at the residence.

6. That Ursery stores marijuana in a crawl space inside the residence.

7. That Ursery uses chicken wire to surround the growing marijuana plants to keep animals from eating the immature plants.

8. That Ursery has used the same growing methods and pattern every year.

9. That Ursery has numerous firearms, including firearms kept under his bed, a loaded firearm near the fireplace of the residence.

10. Ursery has told the informant that he would shoot anyone found on the property. Ursery told the informant if you are going to shoot a cop, then shoot him in the head.

C. Affiant was advised by Farrier that the informant could draw a map of Ursery's property showing the locations of marijauna being grown.

D. That on 06-22-92 the informant did in fact draw a map of the property for Farrier. Farrier did locate a residence at 1700 Braden Rd.

E. Affiant did personally verify through Secretary of state and vehicle records that Guy Ursery does live at 1700 Braden Rd. Perry, and that there is a Brian Ursery shown as residing there also.

F. That Affiant and Farrier did personally drive by the residence located at 1700 Braden Rd., Perry and the map closely resembled the actual property layout.

G. That on 07-27-92 Affiant and Farrier walked onto the property described on the informants map. Affiant and Farrier verified the map as being accurate by using landmarks drawn by the informant.

H. That Affiant and Farrier did locate at least three plots of suspected marijuana in the location described on the map. These plots were surrounded by chicken wire as described by the informant. Two plots held approximately nine plants each and one plot held approximately twenty five plants.

I. That Affiant did seize one plant from the plot and Affiant believed the plant to be marijuana. This plant was seized on the same date of 07-27-92.

J. That Affiant personally delivered the seized plant to Laboratory expert Phyllis Good at the MSP Crime Lab, and that Phyllis Good conducted a cursory examination of the seized plant and verified that the plant was indeed marijuana.

Whereas the Affiant has personally verified information received from the informant and believes the

informant to in fact be credible and reliable based on the foregoing information, and Affiant has reasonable and probable cause to believe, and does believe, that the above described premises contain evidence of violations of criminal statutes of Michigan, and therefore requests the court issue a warrant directing any officer of the State of Michigan to search the place described above and to seize those items described above and to make return and tabulation thereof according to law.

Further the Affiant sayeth not.

[7-29-92]
Date

/s/ BART J. BARNES
J. BARNES
Judge/Magistrate

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE No. 93-CR-50016
HONORABLE AVERN COHN

UNITED STATES OF AMERICA

vs.

GUY JEROME URSERY, DEFENDANT

TRIAL EXCERPTS

APPEARANCES:

MARLENE A. DAYNE, ESQ.
Assistant United States Attorney
206 Federal Building
600 Church Street
Flint, Michigan 48502

Appearing on behalf of United States of America.

LAWRENCE J. EMERY, P.C.
Point North Professional Center
Suite 104
3401 East Saginaw
Lansing, Michigan 48912

Appearing on behalf of Defendant Guy Jerome Ursery.

[87]

* * * * *

[Excerpts from Trial Testimony of Heather McPherson, Tr. 134-186]

* * * * *

[134]

* * * * *

HEATHER McPHERSON,
having been first duly sworn, was examined and testified upon her oath as follows:

DIRECT EXAMINATION

BY MS. DAYNE:

Q Please state your full name and spell your last name.

A My name is Heather Ann McPherson. Do you want me to spell my last?

Q Yes.

[135]

A M-c-P-h-e-r-s-o-n.
Q How old are you?
A I am 20.
Q Are you currently employed?
A Yes, I am.
Q Where are you working?
A At Ewell (ph.) Barber Shop in Perry, Michigan.
Q Do you know someone named Brian Ursery?
A Yes, I do.
Q How and when did you meet?
A I met him in 1988 or '89.
Q How did you happen to meet him at that time?

A He was a new student at my high school.
Q Was that in Perry?
A No, in Morris.
Q And what was your relationship with Brian Ursery?
A He was my boyfriend for about three years.
Q When did you start dating or start calling him your boyfriend?
A On April 7th — September 7th of '89.
Q And at some point you broke up?
A Yes, in February of '92.
Q Now, during that time that you and Brian were boyfriend and girlfriend, where did Brian live?
A He lived at 1700 Braden Road in Perry, Michigan.

[136]

Q And about how many times were you in the Ursery's house at 1700 Braden Road?
A Several times.
Q Could you give us approximately a number or how often?
A Almost every day of the week.
Q What is your relationship with Brian today?
A We were friends, but I don't think we are any more.
Q Do you know Brian's father, the defendant, Guy Jerome Ursery?
A Yes.
Q Do you remember when you first met him?
A I met him about two weeks after I started going with Brian.
Q September '89 that would have been?
A Yes.

Q Now, was the defendant also living at 1700 Braden Road?

A Yes, he was.

Q About how much property did the defendant own?

A About ten acres.

Q Did anyone else live there besides the defendant and Brian?

A Yes, the defendant's wife, Sandy Ursery.

Q Do you know approximately how long he had lived at 1700 Braden Road as of this date?

A Yes, probably about four or five years.

Q And about how far away from the Ursery's house is the next closest house?

[137]

A About a quarter of a mile.

Q And a quarter mile away, how many houses are there?

A Just one.

Q And then after that house, how close would the next house be?

A About a mile.

Q Have you ever seen marihuana plants growing at the defendant's house?

MR. EMERY: Objection, your Honor, without an indication of time, time limits.

THE COURT: I suppose this is a prefatory question.

Go ahead.

Q (By Ms. Dayne): Have you ever seen marihuana plants growing at the defendant's house?

A Yes, I have.

Q And when was that?

MR. EMERY. Objection, your Honor, basis for her knowledge that it was on this property which she has testified to.

THE COURT: Well, okay, wait a second.

That's a rather general question, Counsel.

MS. DAYNE: I am going to go into detail.

THE COURT: Well, in the house or out of the house.

Q (By Ms. Dayne): Did you see marihuana plants growing inside or outside of the defendant's house?

[138]

A Both.

Q And when was the first time you saw this?

A It would have been the second summer that I dated him, which would have been '91 — or '90.

MR. EMERY: Objection, your Honor. It's irrelevant.

THE COURT: Well, there is no pending question. Let's see where we go.

Q (By Ms. Dayne): Okay. You started to go out with Brian in September of '89?

A Yes.

Q And you said the second summer after you started going out with him?

A Yes.

Q So when would that have been?

A It would have been '91.

Q And the first time you saw marihuana plants, where specifically did you see them?

A The first time I saw them?

Q Yes.

A They planted them in little plastic crates and put them out on a pallet in their back yard.

Q Well, how far from the house would that have been?

A How far would the pallet have been?

Q Yes, where the plants were.

[139]

A About half the length of a football field.

Q Now, did you ever see the defendant or anyone else do anything to take care of those plants?

A Yes, I did.

Q Who did you see do something?

A They all participated.

Q Who do you mean by "they all"?

A Cindy, Jerry and Guy.

Or Cindy, Jerry and Brian,

Q During the time that you were going with Brian, did you call the defendant Jerry?

A Yes.

Q Did his friends call him that?

A Yes, that's what everybody calls him.

Q Okay. So if you during the testimony say "Jerry," you mean the defendant?

A Yes.

Q Just so we understand.

Okay, and what you said you saw the defendant, his wife and his son do something to take care of the plants: What did you see them do?

A They watered them. They would cover them up partial time of the days so that they wouldn't get too much sun or they wouldn't get frost out at night.

MR. EMERY: Objection as to the time, your Honor, when this was observed.

[140]

THE COURT: You'll have a right to cross-examine.

MR. EMERY: Thank you, Judge.

THE COURT: Go ahead.

Q (By Ms. Dayne): Do you know where the defendant got the marihuana seeds to start these plants?

THE COURT: Just yes or no.

A No.

Q (By Ms. Dayne): Did the defendant ever tell you where he got the seeds?

A No.

Q Now, these let's call them seedlings, how big were they when you first saw them?

A Oh, I don't know, not very big. They were just coming up.

Q Did you see that those seedlings were ever transplanted?

A I wasn't present when they were transplanted, no.

Q Do you know if they were?

A Yes.

MR. EMERY: Your Honor, I object. She's not competent to give an opinion.

THE COURT: Well, wait, Counsel.

MR. EMERY: No, she is testifying—

THE COURT: But there is no pending question. She said she did not see them transplanted. There is no pending question.

[141]

MR. EMERY: Well, I think the next question, your Honor, is "were they transplanted" and she said, "Yes."

THE COURT: Well, we don't know that. You'll have an opportunity to cross-examine.

Go ahead.

Q (By Ms. Dayne): Did you see the marihuana plants in a different location?

A Yes.

THE COURT: Well, wait a minute. Did you see those that were on the pallet or did you see marihuana plants in a different location. There is a distinction.

Q (By Ms. Dayne): Did you see those marihuana plants that you had seen on the pallet, did you see those in a different location at any time?

A Well, I was told they were the same ones, yes.

MR. EMERY: Objection.

Q (By Ms. Dayne): Who told you that?

MR. EMERY: Hearsay. Objection, your Honor.

THE COURT: Mr. Emery, you've got to wait. She's being asked. It depends upon who told her — whether or not it is hearsay.

MR. EMERY: Agreed.

THE COURT: Go ahead.

Q (By Ms. Dayne): Who told you that?

A The defendant and the defendant's son.

[142]

Q Where were these marihuana plants when you saw them later?

A Out in the fields by their house.

Q Did you know at the time who owned that property where the plants were?

A I assumed they did.

Q Why did you assume that?

A Because they used that property.

Q About how many times did you see the marihuana plants in the ground on that property?

A About five times.

Q Did somebody take you out to show you those plants?

A Yes.

Q Who did that?

A The defendant's son.

Q About how far from the house were these marihuana plants growing?

A I'd say about a hundred yards.

Q When you were out at the marihuana plants, if you looked back in the direction of the house, could you see the house?

A Yes.

THE COURT: This is all the summer of '91, right?

THE WITNESS: Yes.

THE COURT: Go ahead.

Q (By Ms. Dayne): About how many times did you see those plants while they were growing?

[143]

MR. EMERY: Objection. Both asked and answered, your Honor.

THE COURT: I believe she has already answered that.

Q (By Ms. Dayne): The first time you saw the plants growing, about how tall were they?

A Oh, they were, oh, about two or three inches—two or three feet high.

Q And about how many plants were there? What configuration were they in?

A As in how many were in each plot?

Q How many plots were there and how many plants in each plot.

A There were about five plots, and I'd say about a dozen to each plot.

Q Was there any kind of fencing around each plot?

A There was one that I remembered that had, like, chicken wire around one of them.

Q And what did the land look like that surrounded these marihuana plots?

A Mowed down.

Q Tell us more specifically what was mowed?

A The grass, the weeds that went to the plants was mowed by the people, by the defendant and his son. They mowed it.

Q They mowed around the plants?

A They mowed a path to get to it and around the plants.

Q How do you know—

[144]

MR. EMERY: Excuse me, your Honor. She should tell us the foundation, if she had personal knowledge.

THE COURT: Well, wait. You will have an opportunity to cross-examine her.

Go ahead, Counsel.

Q (By Ms. Dayne): How do you know that they moved around the plants?

A Because I was there and I know. I was there and I know.

THE COURT: Well, wait. Now, you can't just say you know. Did you see somebody with a mower or scythe?

THE WITNESS: Yes, a mower. A Ragmonier (ph.) which belonged to her, to Cindy's father.

Q (By Ms. Dayne): Now, outside the areas that were mowed, the paths around the marihuana plants, what did that area look like?

A Around where the plants were? Outside them?

Q Outside.

A All leafy.

Q And trees?

A Yeah.

Q Now, the last time, I believe you said you saw these plants several times that summer. The last time you saw those plants, how big were they?

A Taller than me.

Q Now, during that summer of '91, did you ever see the [145] defendant with a marihuana plant or part of a plant that had been pulled?

A Yes.

Q What did you see and where?

A One day the defendant came in the house and said that a piece of one of his plants fell out and he was going to put it in the freezer to save it.

Q And did you see him put it in the freezer?

A Yeah, it was in the garage the day that he did that.

Q Was there any other time you saw the defendant come in the house with a plant or part of a plant?

A No, because I wasn't there when they harvested them.

Q Did you ever see the defendant put a marihuana plant or part of a plant in the oven or microwave?

A Yeah.

MR. EMERY: Object to the leading nature of the question, your Honor.

Q (By Ms. Dayne): When was that?

THE COURT: No, no, another time.

Q (By Ms. Dayne): When did you see that?

A September sometime maybe.

Q And what did you see this defendant do?

A He took a bud that he had and he wanted to smoke it, and it wasn't dry so he put it in the microwave to dry it out.

Q And you saw him do that?

[146]

A Yes.

Q And did you see him take it out of the microwave?

A Yes.

Q And what did he do then?

A He cut it up and he rolled it in papers and then he smoked it.

Q Do you know if these marihuana plants were ever harvested?

A Yes, I do.

Q How do you know that?

A Because one day I called the defendant's son because he was supposed to come to my house, and he couldn't come because he had to help his dad pull plants.

MR. EMERY: Well, objection, your Honor.

THE COURT: That would be hearsay, wouldn't it?

MR. EMERY: Yes.

MS. DAYNE: Yes.

THE COURT: It would be based upon what the son told her.

MS. DAYNE: The son and the wife were co-conspirators, your Honor. She has testified that they would both help take care of these plants.

THE COURT: They are not charged.

MS. DAYNE: That's right.

THE COURT: I'll allow the testimony.

MR. EMERY: All right.

[147]

Q (By Ms. Dayne): Do you know what happened to the marihuana plants after they were pulled?

A Yes, I do.

Q What happened to those plants?

A They were taken into the defendant's home in a crawl space and hung by hooks.

Q Did you see them there?

A Yes, I did.

Q How did you happen to see them there?

A They showed them to me.

Q Who do you mean by "they"?

A The defendant.

Q And how did you get into this crawl space?

A When you go into the house there is a master bedroom to the left, and there is also a closet behind the master bedroom door, and in that closet there is a door on the floor that you pull up and that is the entrance to the crawl space.

Q Who sleeps in that master bedroom?

A The defendant and his wife.

Q Now, did you actually go down in the crawl space? How did you see what was down there?

A I laid on the floor and put my head down to look.

Q And what exactly did you see?

A Marihuana plants hanging from hooks upside down.

Q Was there any light down there that allowed you to see [148] this?

A Yes, there was. There was a purple, I guess they call them grow lights, with—and they had aluminum foil spread out around down in the crawl space. And they had this light on all the time.

Q Why do you say it was on all the time?

A Well, because in one of their bathrooms that you go into there is a vent, and in that vent you can see the light from the bathroom vent.

Q Sort of back in the floor, you mean?

A No, it's in the wall, but you can see it shining up because it's from that point up.

MS. DAYNE: May I approach the witness, your Honor?

Q (By Ms. Dayne): I have handed you Government's Exhibit Number 16. What is that a photograph of?

A The entrance to the crawl space in the defendant's home.

Q Now, do you know what happened to this marihuana that you saw in the crawl space after it was dried?

A They smoked it.

Q Who did you see smoke it?

A Jerry and—or Guy and his friends, and sometimes the defendant's son.

Q Did you ever smoke it with them?

A Yes, I did.

Q Do you still smoke marihuana?

[149]

A No, I don't.

Q You know it's illegal, right?

A Yes, I do.

Q Why did you smoke with them?

A I don't know.

Q When you went into the defendant's house, and I'm talking about this whole time that you went with Brian, was there any time that you were in the house that you could smell marihuana in the house?

A Yeah.

Q When could you smell it?

A Whenever they smoked it. Whenever you walked into the house.

Q About how long would that have been? You said you were in there almost every day.

A Every day.

Q Did you ever see any firearms at the defendant's house?

A Yes.

Q Where did you see firearms?

A They kept one, it was either by the fireplace all the time or the back door all the time.

Q Was this a long gun?

A Yeah, it was like a rifle or something like that.

Q Do you know if that gun was loaded?

A Oh, yeah.

[150]

Q How did you know it was loaded?

A Because one day we saw a frog in the back yard and we shot at the frog, and I asked how come they kept it loaded and they said for trespassers.

MR. EMERY: Objection, your Honor.

THE COURT: I must hear a basis for it now to be able to admit this under an exception to hearsay.

MR. EMERY: Well, I just—

THE COURT: You're not asking your questions in short enough phrases.

Let's go ahead.

Q (By Ms. Dayne): Do you know Officer Chester Farrier of the Morris Police Department?

A Yes, I do.

Q Did you tell him about what you just testified?

A Yes, I did.

Q Did you describe to him where the marihuana plots were?

A Yes.

Q And did you assist in making a diagram showing where the actual marihuana plants were growing?
A Yes, I did.
Q Did you actually draw the diagram?
A No, a friend of mine drew it because I am not a good drawer.
Q And this diagram was made before the search warrant was [151] executed on July 30th?
A Yes.
Q Approximately when was the first time you ever spoke to anyone from the State Police about his case?
A Um, after, after the search warrant was—
Q Executed?
A Yeah, executed.
Q Okay. Well, approximately how long after, a month, two months, a year?
A A month.
Q And do you remember who you first met with?
A Yes, I do.
Q Who was that?
A Mike Pifer and Frank Secido.
Q And you talked to them about this case?
A Yes.
Q And did they give you any money?
A Yes, they did.
Q Do you remember how much money they gave you?
A Two hundred dollars.
Q Did they tell you why they were giving you that money?
A To pay for any inconvenience or expenses.
Q Was there another time that they gave you money?
A Yes.
Q Do you remember when that was?

[152]

A It was in February when I went to testify in front of the Grand Jury.
Q Do you remember how much you got that time?
A I got a hundred dollars.
Q And was there another time?
A Yes.
Q Do you remember when that was?
A Last month on the 16th, I think, when I went to review my testimony.
Q Was that when you came to my office?
A Yes.
Q And how much money did you get then?
A Two hundred dollars.
MS. DAYNE: I have no other questions, your Honor.
CROSS-EXAMINATION
BY MR. EMERY:
Q Good afternoon, Ms. McPherson.
A Good afternoon.
Q We've never met before, is that right?
A That's right.
Q And you haven't had anyone representing Mr. Ursery ask you any questions before, have you, about what you know about Mr. Ursery?
A No.
Q All the questions that have been asked you so far are [153] questions asked you by police officers and the United States Attorney?
A Yes.
Q Including at the Grand Jury. Maybe a Grand Juror asked you a question?
A Yes, a Grand Juror asked me a question.

Q All right. But today nobody has asked any questions who represents Mr. Ursery's interests, is that correct?

A No, sir, that is correct.

Q My understanding is that in the calendar year 1992 you didn't see anything growing in Mr. Ursery's home or adjacent property or anything; is that a fair statement?

A That is a fair statement.

Q The only information that you are giving the jury today is about something you saw in 1990 or '91?

A That's right.

Q You have no trouble remembering what you heard, is that right?

A Well, all of it was '91.

Q You think it was '91?

A I know it was '91.

* * * * *

[163]

* * * * *

Q Do you know whether or not the Urserys built the home that is located there at 1700 Braden Road?

A They didn't build it. They had a contractor build it.

Q Well, okay. But it was a newly-built home, wasn't it?

A Yes.

Q And have you lived out in that area for most of your young life?

A Yeah, all of my life.

Q Okay. Did that area where this house was built, prior to it being built, was there any homes or

anything in that area? Do you understand what I mean?

A In the area that their house was or on that road in [164] particular?

Q In that particular area where their house now is.

A No, it was an all-wooded area.

Q So someone threw in an cleared out an area for a house and they built a house there?

A Yes.

Q And you observed that in progress during the years that you were out there?

A Yes.

Q And did someone clear out the telephone poles in there so they could have utilities to the house?

A I don't know that much about it now.

Q Was your understanding though that it was all woods in that area prior to building the house?

A Yeah, all my life it was up until that point.

Q Do you have access to that property from locations other than the driveway and the yard immediately surrounding the house?

A Yeah, but it's really thick wood. I don't you'd be able to get it through very good, no.

Q Okay. You said that you drew a map, that you had a friend draw a map?

A Yes.

Q Is that right?

[165]

By the way, do you know who owns the property that surrounds the Ursery's property?

A Just in the back field and on the interfacing opposite of Braden Road. The back field and the field next to it is a friend of ours names Nanasy's.

Q They are friends of yours, are they?

A Yes, friends of our family.

Q I show you what has been marked as Defendant's Exhibit F. Would you look at that, please?

Can you identify that?

A Yes.

Q What is that?

A That is the diagram or the map that my friend wrote or drew of their property.

Q And you gave the person directions to draw the map?

A Yes.

She had been on that property before too.

Q Okay. And this map you drew to be accurate, you were going to give it to a police officer; is that correct?

A Right.

Q Is this map an accurate representation of that property?

A Well, from an amateur point of view I assume that it is.

Q From an amateur?

A Yeah, we are not artists.

Q Does the Ursery property border State Road on the west?

[166]

A Not that I know.

Q Does this map indicate to you that the property is bordered on the west by State Road?

A Yeah.

Q That's funny?

A But it's only 'cause it'd been raining and it wasn't measured out. We didn't measure any portion of the—

Q Did you measure the hundred yards you claim the plots were from the house?

A No, that was just a rough estimate, out of my own thinking.

Q Okay. And you were going to give this to the police, weren't you?

A Yes.

Q You did give it to them as an accurate representation of what the property was?

A No, I gave it to them as a—as kind a go-for. I didn't—It wasn't supposed to be like perfect to a T, 25 yards here and 25 yards there. It was just, like I said, an amateur drawing of a map.

Q I want you to look at Exhibit H that has been admitted into evidence in this case, Ms. McPherson.

Have you ever seen that photograph before?

A No.

Q Does that represent anything that you are familiar with?

A Yes, this is State Road and Braden Road.

[167]

Q Okay.

Do you see the Ursery property?

A Yeah.

Q Do you know where their property ends on the western boundary in the photograph?

A I can't say that I do.

Q It doesn't end at State Road, though, does it?

A No, because there's field over here, and I know whose property that is.

Q That's Mr.—

A Nanasy.

Q Nanasy's property.

Did you ever see Mr. Nanasy out in the field adjoining the Ursery property in 1991?

A Or doing what?

Q Did you see Mr. Nanasy out in the field with some relative of his?

A Andy went out in the field to do his harvesting and stuff like that.

Q He was out there frequently?

A Well, same as any normal farmer would be.

Q Did you ever see traffic up and down Braden Road when you were at the Ursery home?

A Yeah, but not very often.

Q Did you ever see any cars parked on Braden Road to the west [168] of the Ursery property before you got to State Road?

A Not to my recollection.

Q I'm talking about this area here.

A Parked?

Q Yeah, like alongside the road.

A Not to my recollection, no.

Q You never saw that. All these years that you were with Brian McPherson.

A No, they used—I saw them parked down State Road.

Q You saw them parked over here?

A Yes.

Q Okay.

A Yeah.

Q Before this property, the home was built on this property, did kids use this property, teenagers?

A The people who lived down that way just took over the woods. The young kids in the area would go down in the woods.

Q To have a bonfire and—

A No, no. We were really young. We would go and carve in the trees and stuff like that.

Q Okay. You don't know if there was any party or whether there was a party there before?

A. No, I was real young.

Q Now, the Nanasys are your friends; is that right?

A Yes.

[169]

Q Good friends?

A Yeah.

Q Looking at your testimony and talking about seeing things happen, and you use the word "they"; is that correct?

A Yeah.

Q You are saying not just Mr. Ursery but other people were involved in doing some things with respect to the marihuana that you saw in '91?

A Pardon me.

Q Okay. Are you telling us that you saw people other than the defendant who is on trial in this case doing something with respect to the marihuana that you saw in 1991?

A Yes.

Q And those people were who?

A The defendant's wife and son.

Q Was there ever anyone else?

A Yeah, me. I carried a bucket of water out one day.

Q This is '91?

A Yes.

* * * * *

[179]

Q Did anyone tell you that the marihuana plots that they found [180] in 1992 were not on Ursery property?

A Yes.

Q Who told you that?

A The State Police and Marlene.

Q Did anyone tell you that this map that you helped compose and give to the police was not accurate?

A No, I had heard that it was pretty much accurate.

Q Oh, that's what they told you?

A Yeah.

Q Did they ask you, "Well, gee, this isn't Braden Road and State Road over here in the corner of the property"? No one said that to you?

* * * * *

[185]

Q Okay. Let me see if I understand what your testimony is today.

Your testimony is that sometime after you and Brian Ursery broke up in 1992 you got into a conversation with Chester Farrier, a police officer of the City of Lawrence, and told him about marihuana growing on the Ursery property; is that correct?

A That's correct.

Q The reason for you and Brian breaking up is all your idea or his?

A Mine.

Q This was your breakup?

A Yes.

Q You wanted to break up?

A Yes, it was.

Q And then, has what you told the Government included this map, Exhibit A of the—excuse me, Exhibit F for the defense?

A Yes.

Q And then you have testified about information that you [186] observed in 1991, not 1992; is that correct?

A Yeah.

* * * * *

[Excerpt from charging conference, Tr. 289-292]

[289]

* * * * *

THE COURT: You are asking for an instruction on the charge of simple possession?

MR. EMERY: That's correct, Judge.

I have such instruction prepared for that offense.

[290]

MS. JUHASZ: I oppose that request, your Honor. That is the first I have heard of it, so I didn't have the time to research it.

But my recollection of the research that I have done before indicates that it is not appropriate in a case such as this, when the evidence is so overwhelming, that he either planted those marihuana plants or he did not.

Certainly I guess you could look at possession as a part of the charge of the marihuana plants. It is a constructive possession of the plants he was growing, but I don't believe that the charge of simple possession of marihuana is adequately described by the evidence that we have seen in this case.

MR. EMERY: Judge, it is my position that we have indeed had evidence from which the jury could infer possession of marihuana; and it is for that reason alone that I ask for the instruction.

THE COURT: Well, you see, the trouble is here that possession or marihuana is really possession at the end of the manufacturing process. I have not researched this myself, but it seems to me that the charge includes the fact of marihuana in useable form.

The marihuana here that he is charged with manufacturing is not in useable form. It's not any of the marihuana that was found in the house. It's not any—Indeed, [291] no useable marihuana was found in the house.

To my recollection there were some seeds and there were some cigarette butts that assayed out as marihuana, but I don't recall any testimony that there was, I guess to use the vernacular, grass in smoke-

able form, that did not require some further processing.

MR. EMERY: Judge, the only thing I can see is Exhibit 13, which does contain some leafy material, and that is —

THE COURT: The leafy material wasn't analyzed.

MR. EMERY: I think it was.

THE COURT: Was it?

MR. EMERY: Yes, that's part of Exhibit 7.

THE COURT: Yes, but that's not what the charge is.

MR. EMERY: I agree with that.

THE COURT: That's not what the charge is.

And the Government isn't going to suggest that he can be convicted on anything found in the house.

Now, let me suggest this to you: If, after the conclusion of the argument—

MR. EMERY: I will not mention it in my argument, then.

THE COURT: All right.

If, after the conclusion of the Government's argument, first of all, if the Government intends to suggest that anything in the house can be used to convict per se, then I'll [292] see where we go. It is my understanding that the Government is going to argue that the manufacture of the plants that were in the field, and that's not possession of marihuana.

MR. EMERY: The only cases that I could find, Judge, were situations where we have had possession with intent to distribute or distribution of marihuana.

THE COURT: That's right, And there is no charge here of possession with intent to distribute.

Indeed, one of the interesting aspects of this case is the Government has made no effort to suggest that he wasn't going to use this for his own purposes.

MR. EMERY:Judge, may I take up a further matter with the Court?

THE COURT: No, I am going to give the instruction at this time.

MR. EMERY: Thank you, Judge.

* * * * *

[Excerpt from Prosecutor's Rebuttal Summation, Tr. 334-335]

[334]

The defense spent most of his time during this trial trying to make a big issue that the plants weren't on the defendant's property.

If you recall, when we started this trial on Tuesday, the Government right from the very beginning, my opening statement, I didn't say these plants were on the defendant's property. That issue has never been in dispute. The Government later learned that it was on property adjacent to the defendant's property. The plants were within 25 feet of his property. The Government presented no evidence to show that [335] those plants grown on land titled by the defendant.

And if you recall, when Mr. Emery was cross-examining Sgt. Feahr and implying that it was somehow improper that he didn't do more to find out who owned that property, Sgt. Feahr said that the titleowner of that land was not important to him. And likewise it should be of little or no importance to you as you examine the evidence in that trial.

Recall what one of the defense witnesses said. John Boggs said it's common for people who illegally grow

marihuana to plant it on adjacent, abandoned property. The defendant is not stupid. It's not surprising the plants were not on land that he owned. It's much smarter for him to go just over the property line onto the vacant land next door. Close enough that he could cultivate them, keep an eye on them, guard them but safely on land owned by someone else. So that if the police found them, discovered these plants, the defendant could say, "Weren't on my land."

* * * * *

[Excerpt from Jury Instruction, Tr. 360-361]

[360]

You have heard testimony which, if believed, would suggest the defendant may have been involved in the commission of crimes, wrongs or acts not charged in the indictment.

The defendant was not on trial for any charge other than that set forth in the Indictment.

However, the law permits evidence of other crimes, wrongs or acts to be considered by a jury for certain limited purposes. This evidence has been admitted in this case for such limited purposes relating to the charges contained in Count 1 of the Indictment.

Testimony relating to such other crimes, wrongs or acts may only be considered by you in connection with the question of a defendant's identity, knowledge, plan or common scheme regarding the charge contained in the Indictment. You [361] must first determine from all of the other evidence in the case whether you are satisfied beyond a reasonable doubt that the defendant did the act charged in the Indictment. If you do so find you may then, and only then, consider testimony regarding acts not charged

in the Indictment in determining whether in doing the act charged in the Indictment the defendant had an identity, knowledge, plan or common scheme in regard to the charge in the Indictment, and not because of mistake or accident or other innocent reason.

The reason why the law treats such "other acts" evidence, as it is called, in the way I have described is because the law recognizes that it would not be fair to put the defendant on trial for charges not contained in the Indictment or call on a jury to speculate on the defendant's innocence or guilt of the charges in the Indictment on the basis the defendant may have been guilty of other acts.

* * * * *

UNITED STATES DISTRICT COURT

Eastern District of Michigan

In the Matter of the Seizure of
(Address or brief description
of property or premises to be
seized)

CERTAIN REAL PROPERTY LOCATED AT 1700 BRADEN ROAD, PERRY, SHIAWASSEE COUNTY, MICHIGAN, TOGETHER WITH ALL OF ITS FIXTURES, IMPROVEMENTS AND APPURTENANCES

SEIZURE WARRANT

CASE NUMBER 92X75843

TO: Agents of the Drug Enforcement Administration and any Authorized Officer of the United States: Affidavit(s) having been made before me by Christopher J. Hackbarth who has reason to believe that in the Eastern District of Michigan there is now certain property which is subject to forfeiture to the United States, namely (describe the property to be seized)

CERTAIN REAL PROPERTY LOCATED AT 1700 BRADEN ROAD, PERRY, SHIAWASSEE COUNTY, MICHIGAN, TOGETHER WITH ALL OF ITS FIXTURES, IMPROVEMENTS AND APPURTENANCES

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the property so described is subject to seizure and that grounds exist for the issuance of this seizure warrant.

YOU ARE HEREBY COMMANDED to seize within 10 days the property specified, serving this warrant and

making the seizure (in the daytime—6:00 a.m. to 10:00 p.m.) (at any time in the day or night as I find reasonable cause has been established), leaving a copy of this warrant and receipt for the property seized, and prepare a written inventory of the property seized, and promptly return this warrant to_____

U.S. Judge or Magistrate

as required by law.

[SEP 30 1992] at Detroit, Michigan

Date and Time Issued City and State

MAGISTRATE JUDGE VIRGINIA A. MORGAN

Name and Title of Judicial Officer

_____

Signature of Judicial Officer

Appendix A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff

vs.

CERTAIN REAL PROPERTY LOCATED AT 1700 BRADEN ROAD, PERRY, SHIAWASSEE COUNTY, MICHIGAN, TOGETHER WITH ALL OF ITS FIXTURES, IMPROVEMENTS AND APPURTENANCES

Defendant.

Misc. No. 92X75843

AFFIDAVIT IN SUPPORT OF SEIZURE WARRANT

State of Michigan)
) ss
County of Shiawassee)

I, Christopher J. Hackbarth, being duly sworn state:

1. I am a duly appointed Special Agent of the U.S. Drug Enforcement Administration (DEA), having been employed as such since 1991.

2. By virtue of my employment with DEA, I perform various tasks which include:

A. Functioning as a surveillance agent observing and recording movements of persons suspected of trafficking in drugs.

Appendix B

B. Interviewing witnesses and informants relative to the illegal trafficking of drugs and the distribution of monetary assets derived from the illegal trafficking of drugs.

C. Investigating asset forfeiture relative to the persons property that was used or intended to be used to facilitate a drug violation.

3. I have participated in numerous domestic marijuana investigations from which I have learned:

A. That marijuana growers use specialized lighting systems to imitate sunlight. These lighting systems, in combination with electrical pumps, special exhaust vents to reduce heat and/or odor, and fans used to circulate carbon dioxide and oxygen substantially increase an indoor marijuana grower's electric cost.

B. That marijuana growers attempt to conceal the rooms or buildings used for growing. This frequently takes the form of blacking out all windows and/or sources of outside light.

C. That marijuana growers use chemicals to enhance growth, promote blooming and budding, and to regulate the acidity of the water for optimum growing conditions.

D. That marijuana growers may keep guns at the locations when they cultivate their marijuana to protect their operations.

E. That marijuana growers often start marijuana plants from seeds or seedlings

indoors and transplant them outside as the spring growing season arrives.

F. That marijuana growers often plant the marijuana plants outdoors in areas away from their residence, and in a number of small plots so as not to bring suspicion upon the growers.

4. As part of my responsibilities, I was specifically assigned to aid in the investigation of **Guy URSERY** in the seizure regarding their use of real property located at **1700 Braden Road, Perry, Michigan**, with reference to the manufacture and/or housing or facilitating of drug trafficking. This location is more particularly described as:

Part of the West 1/2 of the Northeast 1/4 of Section 32, Town 5 North, Range 3 East, Michigan, described as: Beginning at a point on the North line of Section 32 which is North 89 degrees 12 minutes 20 seconds East 669.82 feet from the North 1/4 corner of Section 32; thence continuing along said North line of Section North 89 degrees 12 minutes 20 seconds East 633.84 feet; thence South 01 degrees 46 minutes 55 seconds East 686.20 feet; thence South 89 degrees 12 minutes 20 seconds West 637.22 feet; thence North 01 degrees 30 minutes 00 seconds West 686.15 feet to the point of beginning. Subject to that part now used as Braden Road, so-called.

(Commonly know as 1700 Braden Road, Perry, Michigan)

5. As a result of reports made available to me from State law enforcement officers of the Michigan State Police and the Morrice, Michigan Police Department, I have learned the following:

6. Officer Chester Farrier of the Morrice, Michigan, Police Department has a reliable confidential informant, hereafter referred to as STATE-1. STATE-1 advised Officer Farrier that he/she is aware of a subject named **Guy URSERY**, whom STATE-1 has known for several years. STATE-1 told Officer Farrier that **URSERY** grows marijuana on his property every year by first starting seedlings indoors, and then transplanting them outside to let the plants grow to maturity.

7. The informant further advised Officer Farrier that some of the marijuana is dried by **URSERY** on a woodpile in **URSERY's** backyard and the marijuana is stored in a crawl space of the residence.

8. The informant further said that he/she could draw a map of the exact location of the growing marijuana.

9. Officer Farrier then brought this information to the attention of D/Lt. Mike Pifer, and D/Trpr. Tom Feahr of the Michigan State Police-East Lansing Criminal Investigations Team.

10. Trpr. Feahr personally verified through Michigan Secretary of State driver and vehicle records, that a **Guy URSERY** showed to reside **1700 Braden Road, Perry, Michigan.**

11. Trpr. Feahr and Officer Farrier then, using a map drawn by STATE-1, drove by **URSERY's** residence and saw that the map closely resembled the residence and the surrounding area. They then used the map to locate three outdoor marijuana growing plots on **URSERY's** property. Two of the plots contained at least nine growing marijuana plants each, while the third contained at least twenty-five

plants. Trpr. Feahr seized one growing marijuana plant from one of the plots and both officers left.

12. Trpr. Feahr then had a laboratory exam performed on the marijuana plant, and it was found to be marijuana.

13. Based on the above information, Trpr. Feahr obtained a search warrant from the Shiawassee County Prosecutor's Office on July 29, 1992. The warrant was signed by Magistrate Barnes.

14. On July 30, 1992, members of the Michigan State Police executed the search warrant at **1700 Braden Road, Perry, Michigan.** The three outdoor grow plots which had been found by Trpr. Feahr earlier were located, as well as three additional outdoor grow plots. Numeric seeds, stems and other marijuana plant material was also found inside the residence, as documented below:

A. two (2) brown paper sacks, containing 34 clear plastic baggies, each baggie containing a quantity of green plant stems and seeds, later found to be marijuana, retrieved from the right side, middle drawer of the desk in bedroom No.1

B. one (1) brown pill bottle in the name of Sandra Cain containing suspected marijuana seeds, retrieved from the right side, middle drawer of the desk in bedroom No. 1.

C. one (1) Reebok shoe box with ten (10) clear plastic baggies, each containing suspected marijuana seeds. Item was retrieved from shelf of closet in bedroom No. 1.

D. a quantity of marijuana plant stalks and stems, found in the crawl space of the residence.

E. two (2) clear plastic baggies with suspected marijuana seeds inside, retrieved from the closet of the radio room.

F. a one (1) pound box of Ortho general purpose plant food found on a workbench in the garage.

G. one (1) Mossberg 12 gauge shotgun, model 600AB, serial #C80054, found loaded in bedroom No. 1.

H. twenty-four (24) marijuana plants from grow plot #1,

I. thirty-three (33) marijuana plants from grow plot #2.

J. fourteen (14) marijuana plants from grow plot #3.

K. ten (10) marijuana plants from grow plot #4.

L. forty-nine (49) marijuana plants from grow plot #5.

M. twelve (12) marijuana plants from grow plot #6.

N. one (1) Sylvania grow light, a "Gro-Lux" catalog, #GL-1302, two foot fixture and bulb, and two aluminum support brackets, all found in a box.

O. three (3) clear plastic baggies containing green plant stems and seeds, and a pill bottle in the name of Guy URSERY with a partially burnt hand rolled cigarette inside, found in the upper left desk drawer in bedroom No. 1.

The above drug exhibits were sent to the Michigan State Police Crime Lab for analysis. This analysis indicated the above substances were in fact marijuana.

15. A real property title ownership and encumbrance search for the real property located at **1700 Braden Road, Perry, Michigan** revealed a Warranty Deed, dated July 15, 1988 between Rosalio De La Garza and Linda Marie De La Garza, his wife (as sellers) and **Guy URSERY** and Cynthia K. URSERY, his wife (as buyers) for said property, reflecting the consideration of $19,900.00. The title search further revealed a Mortgage, dated May 2, 1989 between **Guy J. URSERY** and Cynthia K. URSERY and NBD Mortgage Company for **1700 Braden Road**, reflecting the principal sum of $41,000.00. The State Equalized Value (SEV) for the above property is $32,550.00.

Wherefore, based on the above presented facts, the affiant asserts that there is probable cause to believe that the above described parcel of real property is subject to seizure and forfeitable as set forth in Title 21 U.S.C. 881(a)(7).

Dated:_____

_____
Special Agent Christopher Hackbarth
Drug Enforcement Administration

Subscribed and sworn
to before me this VIRGINIA M. MORGAN
___day of 1992 United States Magistrate Judge

[SEP 30 1992]

SUPREME COURT OF THE UNITED STATES

No. 95-345

UNITED STATES, PETITIONER

v.

GUY JEROME URSERY

[Filed Jan. 12, 1996]

ORDER ALLOWING CERTIORARI

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted. This case is consolidated with No. 95-346 - *United States* v. *$405,089.23 in U.S. Currency, et al.* and a total of one hour is allotted for oral argument. The brief of the Solicitor General is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday February 23, 1996. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 22, 1996. A reply brief, if any, is to be filed pursuant to Rule 25.3. Rule 29.2 does not apply.

SUPREME COURT OF THE UNITED STATES

No. 95-346

UNITED STATES, PETITIONER

v.

$405,089.23 IN UNITED STATES CURRENCY, ET AL.

[Filed Jan. 12, 1996]

ORDER ALLOWING CERTIORARI

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. This case is consolidated with No. 95-345 - *United States* v. *Guy Jerome Ursery* and a total of one hour is allotted for oral argument. The brief of the Solicitor General is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 23, 1996. The briefs of respondents are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 22, 1996. A reply brief, if any, is to be filed pursuant to Rule 25.3. Rule 29.2 does not apply.

(5) (5) FILED
FEB 23 1996
CLERK

Nos. 95-345 and 95-346

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

GUY JEROME URSERY

UNITED STATES OF AMERICA, PETITIONER

v.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE SIXTH AND NINTH CIRCUITS

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QUESTIONS PRESENTED

1. In No. 95-345, the question presented is whether the Double Jeopardy Clause of the Fifth Amendment prohibits respondent's criminal prosecution for manufacturing marijuana because the government obtained a consent judgment in a civil action that sought the forfeiture of respondent's property on the ground that it had been used to facilitate drug activities.

2. In No. 95-346, the question presented is whether the Double Jeopardy Clause prohibits a civil proceeding for the *in rem* forfeiture of property alleged to be the proceeds of narcotics and money laundering activities where the owners of the property were prosecuted for, and convicted of, narcotics and money laundering crimes.

PARTIES TO THE PROCEEDINGS

The petitioner in both cases is the United States of America. The respondent in No. 95-345 is Guy Jerome Ursery. The respondents in No. 95-346 are Charles Wesley Arlt, James Wren, Payback Mines, and the property listed in the caption to the final judgment of forfeiture, 95-346 Pet. App. 75a-77a.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-345

UNITED STATES OF AMERICA, PETITIONER

v.

GUY JEROME URSERY

No. 95-346

UNITED STATES OF AMERICA, PETITIONER

v.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SIXTH AND NINTH CIRCUITS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals in No. 95-345 (95-345 Pet. App. 1a-27a) is reported at 59 F.3d 568. The order of the district court rejecting respondent's double jeopardy claim (95-345 Pet. App. 38a-41a) is not reported. The opinion of the court of ap-

peals in No. 95-346 (95-346 Pet. App. 1a-23a) is reported at 33 F.3d 1210. An order amending that opinion (95-346 Pet. App. 24a-25a) is reported at 56 F.3d 41.

JURISDICTION

The judgment of the court of appeals in No. 95-345 was entered on July 13, 1995. The judgment of the court of appeals in No. 95-346 was entered on September 6, 1994. A petition for rehearing was denied in No. 95-346, and the opinion was amended, on May 30, 1995. 95-346 Pet. App. 24a-29a. Petitions for writs of certiorari were filed in both cases on August 28, 1995, and were granted by the Court on January 12, 1996 (J.A. 81a-82a). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." The provisions of 18 U.S.C. 371, 981, and 1956 and 21 U.S.C. 841, 846, and 881 are reproduced in the appendices to the petitions for certiorari.

STATEMENT

1. *No. 95-345.* After a jury trial in the United States District Court for the Eastern District of Michigan, respondent was convicted of manufacturing marijuana, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 63 months' imprisonment, to be followed by four years' supervised release. The court of appeals reversed his conviction. Pet. App. 1a-27a.

a. On July 30, 1992, Michigan State Police executed a search warrant and found 142 marijuana plants growing on land just outside the boundaries of respondent's property in Perry, Michigan. Pet. App. 2a. Inside respondent's house, the officers found marijuana seeds, stems, and stalks, two loaded firearms, and a growlight. *Ibid.* While investigating that crime, law enforcement officers learned that respondent had been growing marijuana on his property and the land adjoining it for at least three years. During that period, respondent, his wife, and his son would harvest the marijuana, bring it back to respondent's house, and hang it in a crawlspace to dry. J.A. 44-56, 65-66.

b. On September 30, 1992, the government filed an *in rem* complaint seeking forfeiture of respondent's property under 21 U.S.C. 881(a)(7). Pet. App. 28a-31a. The complaint alleged that, "[f]or several years, the defendant real property was used or intended to be used to facilitate the unlawful processing and distribution of a controlled substance." *Id.* at 29a. Respondent and his wife filed a claim to the property and an answer to the forfeiture complaint. Subsequently, on May 24, 1993, respondent and his wife settled the forfeiture action by agreeing to pay $13,250 in lieu of the forfeiture of the property. *Id.* at 32a-37a.

c. In the meantime, on February 5, 1993, a grand jury returned an indictment charging respondent with a single count of manufacturing marijuana, in violation of 21 U.S.C. 841(a)(1). Pet. App. 3a. The indictment charged that the manufacturing offense occurred on July 30, 1992, the date on which Michigan State Police searched respondent's property. Respondent was not indicted for narcotics possession

or distribution offenses, nor was he charged with any other criminal offense on the basis of his unlawful activities in the years leading up to the search. After his conviction on the manufacturing charge, respondent moved to dismiss the indictment on the ground that the Double Jeopardy Clause barred his criminal conviction following the civil forfeiture of his property. The district court denied the motion, finding that the forfeiture proceeding was not an "adjudication" because it was settled by a consent judgment and that "the forfeiture proceeding and criminal conviction were 'part of a single, coordinated prosecution of [a] person involved in alleged criminal activity.'" *Id.* at 39a (quoting *United States* v. *Millan*, 2 F.3d 17, 20 (2d Cir. 1993), cert. denied, 114 S. Ct. 922 (1994)).

d. A divided panel of the Sixth Circuit reversed. Pet. App. 1a-27a. The majority first found that "jeopardy" had attached in the civil forfeiture proceeding because the "consent judgment in [the] civil forfeiture action is analogous to a guilty plea entered pursuant to a plea agreement in a criminal case." *Id.* at 6a. The court concluded that, because jeopardy attaches in a criminal case when the trial court accepts the defendant's plea, "[j]eopardy attached in a nontrial forfeiture proceeding when the court accepts the stipulation of forfeiture." *Id.* at 7a.

Relying on *United States* v. *Halper*, 490 U.S. 435 (1989), and *Austin* v. *United States*, 113 S. Ct. 2801 (1993), the court next concluded that "any civil forfeiture under 21 U.S.C. § 881(a)(7) constitutes punishment for double jeopardy purposes." Pet. App. 11a. The court then rejected the government's argument that respondent's criminal conviction and the civil forfeiture of his property did not constitute punishment for the "same offence" within the meaning of the Double Jeopardy Clause. The court explained that "the forfeiture necessarily requires proof of the criminal offense. * * * The criminal offense is in essence subsumed by the forfeiture statute and thus does not require an element of proof that is not required by the forfeiture action." *Id.* at 12a. Finally, the court acknowledged that the government may impose multiple punishments for the same offense in a single proceeding, but it declined to find that the parallel civil forfeiture and criminal actions constituted a "single, coordinated proceeding" for double jeopardy purposes, because the actions proceeded before different judges and because there was no communication between the government lawyers assigned to the civil and criminal efforts. *Id.* at 13a-17a.

Judge Milburn dissented. Pet. App. 19a-27a. In his view, the question whether parallel criminal and civil actions are a "single proceeding" for double jeopardy purposes should turn on "the timing of the civil and criminal proceedings and the potential for government abuse of those proceedings." *Id.* at 22a. That approach, he argued, "avoids the inevitable difficulty of a case-by-case comparison of the level of coordination" between the civil and criminal actions. *Ibid.* Because the "government was not acting to pursue a second punishment out of dissatisfaction with the first outcome" and the civil and criminal actions were active during the same time frame, he concluded that those actions were a single double jeopardy proceeding. *Id.* at 22a, 25a.[1]

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[1] Judge Milburn also rejected the majority's conclusion that the civil and criminal actions imposed punishment for the "same offence." He noted that the civil forfeiture complaint

2. *No. 95-346.* In this civil forfeiture action, the district court granted summary judgment to the United States and ordered the forfeiture of United States currency, a helicopter, a boat, an airplane, 138 silver bars, and 11 automobiles. The court of appeals reversed. Pet. App. 1a-23a.

a. Respondents Wren and Arlt participated in a massive conspiracy to manufacture methamphetamine. Respondents and others purchased large quantities of precursor chemicals and delivered them to methamphetamine manufacturers. Respondent Wren not only ordered large quantities of the chemicals, but, with another conspirator, also "transported hundreds of thousands of dollars in cash to pay for" them. Respondent Arlt aided and abetted the manufacture of methamphetamine, and hired others to transport the drugs and to act as intermediaries with Mexican traffickers. See *United States* v. *Arlt*, No. 92-50467, 1994 WL 678535 (9th Cir. Dec. 1, 1994).

On June 12, 1991, a grand jury returned a superseding indictment charging Arlt, Wren, and five others with conspiracy to aid and abet the manufacture of methamphetamine, in violation of 21 U.S.C. 846. The indictment also charged Arlt and Wren with conspiracy to launder monetary instruments, in violation of 18 U.S.C. 371, and Arlt was charged with 17 counts, and Wren with 13 counts, of money laundering, in violation of 18 U.S.C. 1956. Pet. App. 79a-105a. On March 27, 1992, after a jury trial, Arlt and Wren were convicted on all counts. The district court sentenced Arlt to life imprison-

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charged that the defendant property had been used to grow marijuana "for several years," but that the indictment charged an offense occurring on a single day. Pet. App. 26a-27a.

ment and a ten-year term of supervised release, and imposed a fine of $250,000. *Id.* at 106a-108a. Wren was sentenced to life imprisonment and a five-year term of supervised release. *Id.* at 109a-111a.[2]

b. On June 17, 1991, five days after the return of the superseding indictment, the government filed an *in rem* complaint seeking forfeiture under 21 U.S.C. 881(a)(6) and 18 U.S.C. 981(a)(1)(A) of currency, cars, vessels, silver bars, and aircraft seized from or titled to Arlt, Wren, or Payback Mines, a corporation controlled by Arlt. Pet. App. 30a-49a. Wren, Arlt, and Payback Mines filed claims to the defendant properties. By agreement of the parties, litigation of the forfeiture action was deferred during the pendency of the criminal prosecution. *Id.* at 50a-52a.

After respondents' criminal convictions, the government sought summary judgment in the forfeiture case, contending that the defendant assets were the proceeds of illegal narcotics trafficking and, alternatively, were "involved in," or "traceable to" properties involved in, money laundering. The district court granted the government's motion. The court found that all of the assets were subject to forfeiture as proceeds of illegal narcotics activity. In

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[2] On December 1, 1994, the Ninth Circuit reversed Arlt's conviction on the ground that he was improperly denied his right to self-representation, and remanded for a new trial. See *United States* v. *Arlt*, 41 F.3d 516. That decision did not affect Wren's conviction, the only other claimant who was criminally prosecuted. Wren's conviction was affirmed by the same panel in an unpublished order, but (on the government's cross-appeal) the panel vacated his sentence and remanded for resentencing. See *United States* v. *Wren*, No. 92-50467, 1994 WL 678535 (Dec. 1, 1994).

the alternative, the court held that, except for the silver bars, the defendant property was subject to forfeiture under the money laundering theory. Pet. App. 53a-74a.

c. The Ninth Circuit reversed the forfeiture judgment. Pet. App. 1a-23a. The court held that the forfeiture of Wren's and Arlt's property constituted punishment for the same offenses that had formed the basis for their criminal convictions and thus that the forfeiture judgment imposed an impermissible second punishment, in violation of the Double Jeopardy Clause. First, the court held that the civil forfeiture and criminal prosecutions constituted "separate proceedings" for double jeopardy purposes. *Id.* at 7a. Although the court acknowledged that two other circuits had come to the opposite conclusion, *id.* at 8a (citing *United States* v. *Millan*, 2 F.3d at 20; *United States* v. *One Single Family Residence*, 13 F.3d 1493, 1499 (11th Cir. 1994)), it found that "[a] forfeiture case and a criminal prosecution would constitute the *same* proceeding only if they were brought in the same indictment and tried at the same time." Pet. App. 8a.

The court further found that civil forfeiture under 21 U.S.C. 881(a)(6) and 18 U.S.C. 981 invariably constitutes punishment. The court recognized that, under *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984), it was "clear that civil forfeitures did not constitute 'punishment' for double jeopardy purposes." Pet. App. 13a. The panel concluded, however, that this Court "changed its collective mind" (*ibid.*) in *United States* v. *Halper*, 490 U.S. 435 (1989), by holding that certain civil proceedings can result in punishment for purposes of

the Double Jeopardy Clause's prohibition on multiple punishments. The panel found confirmation for that conclusion in *Austin* v. *United States*, 113 S. Ct. 2801 (1993), which held that civil forfeitures of property used to facilitate a drug crime should be considered "punishment" for purposes of determining the threshold applicability of the Excessive Fines Clause of the Eighth Amendment. The panel found that "the only fair reading" of *Austin* is that all civil forfeitures must be deemed "punishment" not only under the Eighth Amendment, but also under the Double Jeopardy Clause. Pet. App. 15a.

d. The government sought rehearing and suggested rehearing en banc, which the court of appeals denied. In denying rehearing, the panel amended its opinion to note (Pet. App. 25a) that its categorical approach was also "compelled" by *Department of Revenue of Montana* v. *Kurth Ranch*, 114 S. Ct. 1937 (1994), a case decided before the panel's decision, but not cited in its original opinion. The panel explained that *Kurth Ranch* "applied *Austin*'s categorical approach for determining when punishment has been imposed in a Double Jeopardy case arising pursuant to a statute that taxed drug monies." Pet. App. 25a.

Seven judges dissented from the denial of rehearing en banc. Pet. App. 25a-29a. Writing for the dissenters, Judge Rymer disputed the panel's conclusion that forfeiting the proceeds of unlawful activity is "punishment." *Id.* at 27a. She also noted that the panel's categorical approach to punishment questions "writes *89 Firearms* off the books" by citing *Halper* and *Austin* "out of context and surmising that 'the Court changed its collective mind' * * * despite the fact that

the Court itself didn't say that it had." *Ibid.* Judge Rymer also rejected the panel's view that *Kurth Ranch* should be read to support a "categorical" approach to the forfeiture of proceeds, noting that "*Kurth Ranch* was a double jeopardy case • • • that was decided after *Austin*, yet mentioned *Austin* only in passing and then only as holding that a civil forfeiture may violate the Eighth Amendment's proscription against excessive fines." *Id.* at 29a n.3 (citing *Kurth Ranch*, 114 S. Ct. at 1945).

SUMMARY OF ARGUMENT

The courts below concluded that under *United States* v. *Halper*, 490 U.S. 435 (1989), and this Court's decisions since *Halper*, each respondent was twice punished, in violation of the Double Jeopardy Clause of the Fifth Amendment. Each court, viewing the second "punishment" as having resulted from an impermissible second "proceeding" against respondents, ordered the second "proceeding" (the forfeiture in *$405,089.23* and the criminal conviction in *Ursery*) dismissed in its entirety. That analysis is erroneous for several independent reasons.

A. The core protection of the Double Jeopardy Clause is the prohibition against prosecuting a defendant more than once for the same offense. That protection is triggered only when a defendant is placed "in jeopardy." This Court's cases have defined that phrase to denote the risk of conviction that a defendant faces before a tribunal vested with jurisdiction to find him guilty of a crime. That understanding of "jeopardy" flows from the unique role and consequences of criminal sanctions in our society.

It also accords with the Clause's historical origins in common-law pleas peculiar to the criminal process.

In rare cases, that core protection against successive prosecutions may be relevant when the government invokes a purportedly civil statute that is so pervasively punitive that due process requires that its sanctions be enforced only after a criminal trial. *E.g.*, *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963). In such a rare case, the application of the purportedly civil sanction could be said to place the defendant "in jeopardy." But that limited principle does not help respondents in these cases, because this Court has long held that *in rem* forfeitures pursuant to civil statutes are not so punitive that they may be enforced only with the safeguards of a criminal trial. The Court most recently reaffirmed that view in *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984), in which it unanimously rejected the double jeopardy claim of a property owner who had been tried for and acquitted of the criminal offenses underlying the forfeiture. In light of *89 Firearms*, respondents have no double jeopardy claim that they have been subjected to multiple *prosecutions*.

B. The courts below relied principally on the multiple *punishments* strand of double jeopardy law, which they believed was effectively revolutionized by this Court's decision in *Halper*. That conclusion reflects a grave misunderstanding of the scope of the prohibition of multiple punishments as applied in *Halper*. That doctrine, which originated with *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), protects two distinct interests of a criminal defendant. The first is that a court may not impose a greater sentence than the legislature authorized. The second is that a court may not increase a defendant's sen-

tence if to do so would disturb his legitimate expectation of finality in a criminal judgment. In either event, the protection against multiple punishments is a consequence of the defendant's having been placed "in jeopardy," and then convicted of a crime.

Halper involved the second aspect of the "multiple punishments" doctrine—the protection of a defendant's legitimate expectation of finality in a criminal judgment. In that case, the government sought what the Court viewed as a punitive civil fine after the defendant's criminal sentence had become final. In rejecting that attempt, the Court did not rely on any view that the civil action was an impermissible second *prosecution* for the offense. Nor did it reject its precedents dealing with whether a nominally "civil" remedy in fact constituted a "criminal" sanction. The Court concluded only that a defendant's legitimate expectation of finality in his sentence, can, in a "rare case," be upset when the government seeks to inflict additional punishment in a civil proceeding. In such a case, the "multiple punishments" doctrine does not bar the second (civil) proceeding, but only so much of the penalty sought as would constitute an additional sentence.

Halper and the "multiple punishments" doctrine it invoked therefore are relevant only when the government can fairly be said to be seeking, in a proceeding commenced after a criminal judgment has become final and unappealable, to increase the sentence reflected in that judgment. Because respondent Ursery entered into a consent judgment of civil forfeiture before he was placed "in jeopardy," that doctrine cannot help him.

C. The respondents in *$405,089.23* were placed "in jeopardy," and convicted in a criminal case, before entry of the civil judgment forfeiting the proceeds of their crimes. They cannot demonstrate, however, that the civil judgment forfeiting the proceeds of their narcotics trafficking should be viewed as a "punishment" under this Court's double jeopardy cases. Nor would respondent Ursery be able to demonstrate that the forfeiture of his property used to facilitate drug offenses constitutes "punishment."

In concluding that civil forfeitures always impose "punishment," both courts below relied principally on *Austin* v. *United States*, 113 S. Ct. 2801 (1993). *Austin*, however, held only that the forfeiture of property used to facilitate drug offenses is sufficiently punitive to be subject to analysis under the Eighth Amendment's prohibition against excessive fines. *Austin* relied on language in *Halper* for a broad definition of "punishment"—a definition that could include any sanction that serves partly as a deterrent. *Austin* also relied on the Court's view that, as a historical matter, forfeiture of property used to commit crimes has always been considered punitive, at least "i[illegible] part." *Austin*'s analysis is inapplicable here. The civil *in rem* forfeiture of instrumentalities of crime has been a fixture of our law since the Nation's earliest years. Even if understood as partly punitive, those civil laws have never been thought so intrinsically punitive, as a categorical matter, as to trigger double jeopardy scrutiny. The holding of *Halper* requires a case-by-case inquiry into the character of the actual sanctions imposed in a particular case as a prerequisite for multiple punishments protection. A categorical application of that protection based on the *potential* that a forfeiture statute may produce a punitive judgment is inconsistent with *Halper*'s holding.

Forfeitures of facilitating property should therefore be examined in accordance with the case-by-case approach adopted in *Halper*. Under that approach, a forfeiture of property that facilitated a drug offense should be found remedial if it can rationally be explained as serving the traditional remedial justifications for that *in rem* remedy: encouraging owners to take care in the use of their property; abating a nuisance; and providing recompense to the government for the law enforcement costs and social harms of drug trafficking. That is the case here with respect to respondent Ursery's property.

Even if the forfeiture of "facilitating" property were found generally to impose punishment for double jeopardy purposes, the forfeiture of "proceeds" of narcotics trafficking should not be found punitive. Statutes providing for forfeiture of proceeds of criminal activity do not share the historical pedigree of other *in rem* forfeitures, on which *Austin* relied, but were first adopted within the last 20 years to ensure that criminal activity is not profitable. Those statutes therefore simply prevent unjust enrichment, a plainly remedial, rather than punitive, goal.

D. Even if civil forfeiture amounts to an "offense" that triggers double jeopardy protections, the "offense" punished in the forfeiture proceedings at issue here is not the "same offense" as any of those of which respondents were convicted. A straightforward application of the "statutory elements" test of *Blockburger* v. *United States*, 284 U.S. 299 (1932), compels that conclusion. Each of the forfeiture statutes requires proof of a fact that the criminal statutes do not require, to wit, that the defendant property played some role in the commission of a crime. Conversely, each of the criminal statutes requires proof of at

least one element not found in the forfeiture statutes, to wit, the property owner's knowing commission of a crime. Indeed, because the government may obtain forfeiture under 21 U.S.C. 881(a)(6) and (7) of property that was merely "intended" for use in a drug offense, forfeiture under those subsections may occur even if no crime actually was committed by anyone.

E. Finally, even if the forfeitures in these cases constitute "punishment" for the offenses of which the claimants were convicted, the civil and criminal sanctions should be regarded as part of a single proceeding for purposes of the Double Jeopardy Clause. The issue whether a "proceeding" is impermissibly successive for constitutional purposes does not turn on formalities such as whether it bears a new docket number, is heard by a new judge, or is handled by a new government lawyer. Those factors are present in many government sentencing appeals; yet, they do not make the appeal a new "proceeding" at which punishment is improperly increased. Rather, because the "multiple punishments" doctrine protects a legitimate expectation of finality in a criminal sentence, a proceeding is impermissibly successive only when it is commenced after the defendant acquires a legitimate expectation that further punishment will not be imposed. It is then that *Halper*'s underlying concern—to prevent the government from seeking a new punishment because it is dissatisfied with the defendant's sentence—comes into play. That concern is inapplicable in these cases, because the government's conduct reveals a design to seek the authorized civil and criminal sanctions in parallel and contemporaneous proceedings.

ARGUMENT

THE PARALLEL CRIMINAL CONVICTIONS AND CIVIL *IN REM* FORFEITURES IN THESE CASES DID NOT VIOLATE RESPONDENTS' RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT

A. *In Rem* Forfeiture Is A Civil, Remedial Sanction That Does Not Implicate The Double Jeopardy Clause's Prohibition Of Multiple Prosecutions

1. The Double Jeopardy Clause provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." That Clause "had its origin in the three common-law pleas of *autrefois acquit*, *autrefois convict*, and pardon," which "prevented the retrial of a person who had previously been acquitted, convicted, or pardoned for the same offense." *United States* v. *Scott*, 437 U.S. 82, 87 (1978); see also *United States* v. *Wilson*, 420 U.S. 332, 340-342 (1975); accord *Grady* v. *Corbin*, 495 U.S. 508, 530 (1990) (Scalia, J., dissenting), overruled by *United States* v. *Dixon*, 113 S. Ct. 2849 (1993); *Green* v. *United States*, 355 U.S. 184, 200 (1957) (Frankfurter, J., dissenting). The "core * * * area protected" by the Clause (*United States* v. *Scott*, 437 U.S. at 96) accordingly has always been the defendant's right not to be tried for a criminal charge more than once. *United States* v. *Wilson*, 420 U.S. at 343; see *Schiro* v. *Farley*, 114 S. Ct. 783, 789 (1994) ("[O]ur cases establish that the primary evil to be guarded against is successive prosecutions: 'The prohibition against multiple trials is the controlling constitutional principle' ") (internal brackets and citations omitted); see also *Tibbs* v. *Florida*, 457 U.S. 31, 41 (1982); *United States* v. *Dixon*, 113 S. Ct. at

2882 (Souter, J., concurring in the judgment in part and dissenting in part).

As the language of the Clause requires, its protection depends upon the defendant being placed "in jeopardy." See, *e.g.*, *Serfass* v. *United States*, 420 U.S. 377, 388, 390-391 (1975). This Court has interpreted that requirement, in light of its history, as being met only by the dangers associated with the actual trial of a criminal case: "Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution." *Breed* v. *Jones*, 421 U.S. 519, 528 (1975); see *Serfass* v. *United States*, 420 U.S. at 391 ("Both the history of the Double Jeopardy Clause and its terms demonstrate that it does not come into play until a proceeding begins before a trier 'having jurisdiction to try the question of the guilt or innocence of the accused' ") (quoting *Kepner* v. *United States*, 195 U.S. 100, 133 (1904)); *Crist* v. *Bretz*, 437 U.S. 28, 34-36 (1978) ("jeopardy" concept protects accused from repeated attempts "to convict," safeguards his right to have his trial completed by a particular tribunal, and therefore has "roots deep in the historic development of trial by jury in the Anglo-American system of criminal justice"); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 548-549 (1943) (" 'jeopardy' within the constitutional meaning" refers to the risks associated with "actions intended to authorize criminal punishment to vindicate public justice").

The reasons for that focus are rooted in the unique role and consequences of criminal sanctions in our society. A conviction represents the societal judgment that a person is a "criminal" and subjects that person to stigma that is unmatched by any other asser-

tion of governmental power. See *Breed* v. *Jones*, 421 U.S. at 530; see also *Price* v. *Georgia*, 398 U.S. 323, 331 n.10 (1970). Each such judgment typically has long-lasting collateral consequences both in the jurisdiction in which the conviction is obtained and in others. See *Benton* v. *Maryland*, 395 U.S. 784, 790 (1969); *Missouri* v. *Hunter*, 459 U.S. 359, 372 (1983) (Marshall, J., dissenting). Because a criminal prosecution "is an ordeal not to be viewed lightly," *Price* v. *Georgia*, 398 U.S. at 331, the fundamental notion of the Double Jeopardy Clause is that the government

> should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. *United States*, 355 U.S. at 187-188; *Serfass* v. *United States*, 420 U.S. at 388; see also *Tibbs* v. *Florida*, 457 U.S. at 41 ("Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance"). Thus, as a general matter, "[s]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in the enforcement of criminal laws." *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) (quoting *United States* v. *Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion of Harlan, J.)); see *Abney* v. *United States*, 431 U.S. 651, 661 (1977).

2. Most cases arising under the "multiple prosecutions" doctrine do not require the characterization of the nature of the proceedings, because there is rarely any doubt that the government seeks a second criminal trial. Instead, those cases primarily involve the question whether the second trial falls within an exception to the multiple prosecutions prohibition. See, *e.g.*, *Richardson* v. *United States*, 468 U.S. 317, 323-326 (1984) (permissible to retry defendant when first trial ends with a hung jury); *United States* v. *Scott*, 437 U.S. at 98-101 (permissible to retry defendant when first trial was erroneously terminated at his behest on grounds unrelated to factual guilt); *United States* v. *Ball*, 163 U.S. 662, 671-672 (1896) (retrial permitted after conviction is reversed on appeal).

Nonetheless, the Court has recognized that a civil statute may be so stigmatizing and punitive in all of its applications that it effectively operates as a criminal sanction. In that setting, the nominally civil sanction is properly characterized as criminal in effect, and such a statute cannot be invoked at all without complying with the safeguards that the Constitution requires for criminal trials. See *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 184-186 (1963) (invalidating a statute that prescribed, without a criminal trial, loss of citizenship for any person who, to evade military service, remained outside the United States in time of war); *Wong Wing* v. *United States*, 163 U.S. 228, 235-238 (1896) (invalidating a statute that provided, without a criminal trial, for aliens to be confined at hard labor for one year before being deported); compare *Allen* v. *Illinois*, 478 U.S. 364, 368-369 (1986) (upholding statute that provided for involuntary civil commitment of "sexually dangerous

persons"); *United States* v. *Ward*, 448 U.S. 242, 248-251 (1980) (upholding statute that imposed civil penalties on parties responsible for the discharge of hazardous substances).[3]

If the government were to invoke such a pervasively penal civil statute against a person who already has been criminally tried for the same offense, it would effectively place him "twice in jeopardy," in violation of the Fifth Amendment. Civil forfeiture statutes, however, have never been viewed as having that effect. This Court has often rejected the claim that statutes providing for the *in rem* civil forfeiture of property are so punitive that they may only be enforced after a criminal trial, or that they place a property owner "in jeopardy." Indeed, because laws authorizing the *in rem* civil forfeiture of property involved in criminal activity—from violations of customs and imposts laws to piracy—were among the earliest statutes enacted by Congress, see *United*

[3] In *Kennedy* v. *Mendoza-Martinez*, the Court identified several factors that, though "neither exhaustive nor dispositive" (*United States* v. *Ward*, 448 U.S. at 249), provide useful guideposts in determining whether particular statutory sanctions are so punitive that they may be imposed only after a criminal prosecution (372 U.S. at 168-169) (footnotes omitted):

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry.

States v. *92 Buena Vista Ave.*, 113 S. Ct. 1126, 1131-1132 (1993) (plurality opinion of Stevens, J.); see also *C.J. Hendry Co.* v. *Moore*, 318 U.S. 133, 139 (1943); *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974), they repeatedly "have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions." *Helvering* v. *Mitchell*, 303 U.S. 391, 400 (1938).

Thus, in *Various Items of Personal Property* v. *United States*, 282 U.S. 577 (1931), the Court unanimously rejected the contention that the prior conviction of property owners for defrauding the government of liquor taxes barred the forfeiture of property—a distillery, a warehouse, and a denaturing plant—used in the commission of the fraud. *Id.* at 580. The Court reasoned that the forfeiture was an *in rem* civil proceeding against the property, rather than "a criminal prosecution [in which] it is the wrongdoer in person who is proceeded against, convicted and punished." *Id.* at 581. The Court accordingly concluded that "[t]he forfeiture is no part of the punishment for the criminal offense," and that "[t]he provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply." *Ibid.*; see also *Dobbins's Distillery* v. *United States*, 96 U.S. 395, 403-404 (1878).[4] Seven years

[4] *Various Items* was decided on the same day as *United States* v. *La Franca*, 282 U.S. 568 (1931). In that case, the Court, to avoid a constitutional issue, unanimously construed a statute that authorized a civil action to recover certain taxes, which the Court viewed as penalties, as not permitting such recovery after conviction of the defendant for a criminal offense arising from the same transactions. Justice Sutherland, who wrote for the Court in both cases, after adverting

later, the Court decided *Helvering* v. *Mitchell*, *supra*, which presented the question whether a proceeding to collect an income tax deficiency and a 50% penalty for fraud was "essentially criminal." 303 U.S. at 400. In rejecting that claim, the Court explained that, "[i]n spite of their comparative severity," customs forfeitures had been held "enforcible by civil proceedings," *ibid.*, and that tax penalties are likewise "remedial" sanctions because "[t]hey are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud," *id.* at 401.

More recently, in *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972) (per curiam), the Court rejected the notion that the Double Jeopardy Clause barred a forfeiture of property smuggled into the United States after the acquittal of the person charged with illegally importing the property. Relying on *Helvering* v. *Mitchell*, *supra*, the Court held that "the forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments." 409 U.S. at 235. The Court found that the forfeiture, "a civil sanction," was properly characterized as remedial because "[i]t prevents forbidden merchandise from circulating in the United States, and, by its monetary penalty, it provides a reasonable form of liquidated damages for violation of the inspection provisions and serves to reimburse the Government for investigation and enforcement expenses." *Id.* at 236-237; see also *Calero-Toledo*, 416

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to *La Franca* in *Various Items*, noted that such considerations did not apply to "a proceeding *in rem* to forfeit property used in committing an offense." *Various Items*, 282 U.S. at 580.

U.S. at 687 n.26 ("forfeiture statutes also help compensate the Government for its enforcement efforts"); *Van Oster* v. *Kansas*, 272 U.S. 465, 466 (1926) (property used to violate the law may be regarded as a "common nuisance").

The Court unanimously reaffirmed its longstanding view of *in rem* forfeitures in *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984). After examining the factors outlined in *Mendoza-Martinez*, *supra*, and *Ward*, *supra*, the Court held that the Double Jeopardy Clause did not bar a civil *in rem* action to forfeit firearms "involved in or used or intended to be used in" violations of the Gun Control Act of 1968 following the owner's acquittal of related violations of that Act. 465 U.S. at 362-366. The *89 Firearms* Court explained that, "[u]nless the forfeiture sanction was intended as punishment, so that the proceeding is essentially criminal in character, the Double Jeopardy Clause is not applicable." *Id.* at 362. In concluding that the *in rem* proceeding could not fairly be viewed as a second criminal prosecution, the Court noted that Congress intended the forfeiture to be a civil remedy, *id.* at 363, that the forfeiture provisions "were meant to be broader in scope than the criminal sanctions," *id.* at 364, since they provided for forfeiture of property "involved in or used *or intended to be used in*" violations of law, *id.* at 363, and that the statute furthered the "broad remedial aims" of "discouraging unregulated commerce in firearms and * * * removing from circulation firearms that have been used or intended for use outside regulated channels of commerce," *id.* at 364. Because the forfeiture served goals "plainly more remedial than punitive," *ibid.*, and the claimant "failed to establish by the 'clearest proof'" (*id.*

at 366) that the statute was "so punitive either in purpose or effect" as to negate Congress's intent "to establish a civil remedial mechanism," *id.* at 365, the Court concluded that the forfeiture was "not an additional penalty for the commission of a criminal act, but rather [was] a separate civil sanction, remedial in nature[,] * * * [that was] not barred by the Double Jeopardy Clause," *id.* at 366.

3. The foregoing cases establish that *in rem* civil forfeiture proceedings under the statutes at issue in these cases cannot be viewed as criminal prosecutions barred by the "multiple prosecutions" component of the Double Jeopardy Clause. Indeed, the Ninth Circuit conceded that under *89 Firearms* "the law was clear" (95-346 Pet. App. 13a) that respondents Arlt and Wren could not secure dismissal of the forfeiture action on double jeopardy grounds. The Ninth Circuit believed (and the Sixth Circuit, in adopting the Ninth Circuit's analysis, presumably agreed, see 95-345 Pet. App. 9a-11a), however, that this Court "changed its collective mind" in three cases decided after *89 Firearms*. See 95-346 Pet. App. 13a.

First, the Ninth Circuit believed that in *United States* v. *Halper*, 490 U.S. 435 (1989), this Court "abandoned the * * * approach" of *Ward* and *Mendoza-Martinez*, which focuses on whether an entire statute is so inherently punitive that its provisions could be enforced only in a criminal trial. In the Ninth Circuit's view, *Halper* adopted instead a new, more expansive definition of "punishment" to be applied on a case-by-case basis. 95-346 Pet. App. 13a-14a. Under that new definition, the court believed that a civil sanction that cannot be said to serve "solely" a remedial purpose, but which also acts as a

deterrent, is "punishment." *Id.* at 14a. Second, the Ninth Circuit concluded that in *Austin* v. *United States*, 113 S. Ct. 2801 (1993), an Excessive Fines Clause case, this Court abandoned *Halper*'s case-by-case approach and adopted a "categorical" analysis. That analysis retains the "new-found wisdom" of *Halper*'s expansive definition of "punishment," 95-346 Pet. App. 14a, but applies it "to the entire scope of the statute which the government seeks to employ," *id.* at 16a. The third case, *Department of Revenue of Montana* v. *Kurth Ranch*, 114 S. Ct. 1937 (1994), was read by the Ninth Circuit as "compell[ing]" its interpretation of *Austin* and *Halper*. See 95-346 Pet. App. 25a.

As we demonstrate next, that analysis of this Court's cases since *89 Firearms* is unsound. It fails to recognize that *Halper* invoked an established doctrine of double jeopardy law—the prohibition of multiple punishments—that by then had developed subject to important limitations. In particular, that branch of double jeopardy law has never been a doctrine that speaks to punishment *simpliciter*, but rather one that comes into operation only when a criminal defendant has been placed "in jeopardy"—*i.e.*, at risk of conviction for a criminal offense. The protection against multiple punishments is a *consequence* of jeopardy, as this Court's cases have defined that term, not a *substitute* for it, as both courts below supposed. Nothing in *Austin* or *Kurth Ranch* changes that understanding.

B. The Courts Below Misconstrued *Halper*, And This Court's Decisions Since *Halper*, By Failing To Recognize The Limits Of This Court's "Multiple Punishments" Cases

1. The doctrine that the Double Jeopardy Clause prohibits the imposition of "multiple punishments" originated in *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873). The defendant in that case had been convicted of a crime for which Congress had authorized a sentence of a $200 fine *or* a one-year prison term, but not both. The trial court, however, mistakenly sentenced Lange both to the maximum fine *and* to a one-year prison term. After Lange had paid the fine, the money had passed into the Treasury, and Lange had served five days of the prison sentence, he sought a writ of habeas corpus from the trial court. *Id.* at 164, 175. The trial court attempted to vacate the earlier judgment of conviction and to enter a new sentence of one year's imprisonment from the date of the second judgment. *Id.* at 175. On the defendant's original application for habeas corpus, this Court ordered him released.

The Court noted that, if the second sentence were enforced, the prisoner would pay $200, serve a year in jail, "and five days' imprisonment in addition." 85 U.S. (18 Wall.) at 175. That result was objectionable on two separate but related grounds. First, when the trial court originally imposed sentence, it had lacked the statutory authority to impose both a fine and imprisonment. Second, once the prisoner fully served either lawful half of the first-imposed sentence, "the power of the court to punish further was gone." *Id.* at 176; accord *Bozza* v. *United States*, 330 U.S. 160, 167 n.2 (1947). The Court justified that conclusion

by invoking not only "the well-settled principles of the common law," 85 U.S. (18 Wall.) at 178; see also *id.* at 176, but also the Double Jeopardy Clause. As to the latter, the Court reasoned that the constitutional protection would be of little value "if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time." *Id.* at 173; see also *In re Bradley*, 318 U.S. 50 (1943).

In light of *Ex parte Lange*'s reasoning, this Court has interpreted the "multiple punishments" doctrine as reflecting two distinct principles of double jeopardy law. The first principle is that the Double Jeopardy Clause prohibits a court, when it sentences a defendant in a criminal case, from imposing "greater punishment than the legislature intended." *Missouri* v. *Hunter*, 459 U.S. at 366; see also *North Carolina* v. *Pearce*, 395 U.S. 711, 717-718 (1969). The second principle is that the Clause protects "also against additions to a sentence in a subsequent proceeding that upset a defendant's legitimate expectation of finality." *Jones* v. *Thomas*, 491 U.S. 376, 385 (1989). An improper increase to a sentence would occur, for example, "where a judge imposes only a 15-year sentence under a statute that permitted 15 years to life, has second thoughts after the defendant serves the sentence, and calls him back to impose another 10 years." *Ibid.*; see *id.* at 392-394 (Scalia, J., dissenting); cf. *United States* v. *DiFrancesco*, 449 U.S. 117, 139 (1980) (government may, notwithstanding *Ex parte Lange*, appeal a criminal sentence where such action is authorized by statute, since such statute

gives notice that district court's sentence is not final); *Pennsylvania* v. *Goldhammer*, 474 U.S. 28, 30-31 (1985) (per curiam) (same; remanding for inquiry into whether State law authorized prosecution's appeal); *United States* v. *Martin Linen Supply Co.*, 430 U.S. at 569 n.6 (noting that, as interpreted in *Ex parte Lange*, "[t]he Double Jeopardy Clause * * * accords nonappealable finality to a verdict of guilty entered by judge or jury, disabling the Government from seeking to punish a defendant more than once for the same offense").[8]

2. *United States* v. *Halper*, *supra*, was an extension of the second principle of *Ex parte Lange*—*i.e.*, the rule that a judgment of conviction in a criminal case, once it has become final and unappealable, may not be modified so as to increase the sentence already imposed. Halper was criminally prosecuted and convicted in 1985 of violating the false-claims statute, 18 U.S.C. 287 (1982), by submitting 65 inflated Medicare claims that each charged $12 for what was really a $3 procedure. He was sentenced to two years' imprisonment and fined $5,000. 490 U.S. at 437 & n.2.

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[8] To the extent that *Martin Linen* read *Ex parte Lange* as requiring "nonappealable" finality for the sentence reflected in a judgment of conviction, see also *United States* v. *Benz*, 282 U.S. 304, 307 (1931), this Court's later decision in *DiFrancesco* rejected that view. While an appellate increase in the sentence imposed by the trial court might be viewed as a second "punishment" in a subsequent "proceeding," the Court held that the defendant can have no legitimate expectation of finality when a statute authorizes the government's appeal, so that the hearing of the appeal amounts "at the most [to the second part of] a two-stage sentencing procedure." *United States* v. *DiFrancesco*, 449 U.S. at 140 n.16.

The government later sought civil sanctions based on the same inflated claims under 31 U.S.C. 3729-3731 (1982), a "fixed-penalty-plus-double-damages provision[]" of the type that "in the ordinary case * * * can be said to do no more than make the Government whole." 490 U.S. at 438, 449. That statute required for each violation a penalty of $2,000, an additional amount equal to two times the government's damages, and the costs of the civil action. *Id.* at 438. Because of his numerous violations, however, "Halper * * * appeared to be subject to a statutory penalty of more than $130,000." *Ibid.* The district court refused to enter judgment in that amount, reasoning that a penalty "more than 220 times greater than the Government's measurable loss qualified as punishment which, in view of Halper's previous criminal conviction and sentence, was barred by the Double Jeopardy Clause." *Id.* at 439-440. On the government's direct appeal, this Court agreed with that conclusion.

The Court framed the issue as whether "in a particular case a civil penalty * * * may be so extreme and so divorced from the Government's damages and expenses as to constitute punishment." 490 U.S. at 442. In answering that question, the Court carefully distinguished the approach it had taken in *Ward* and similar cases, which, the Court explained, "is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter." *Id.* at 447. By contrast, the Court noted, "the Double Jeopardy Clause's proscription of multiple punishments * * * is intrinsically personal," *ibid.*, and "requires a particularized assessment of the penalty imposed and the purposes that the penalty

may fairly be said to serve," *id.* at 448. The Court concluded that "the labels 'criminal' and 'civil' are not of paramount importance" in that inquiry, since "in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated." *Id.* at 447 & n.7. The Court accordingly

> h[e]ld that under the Double Jeopardy Clause a defendant *who already has been punished in a criminal prosecution* may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

Id. at 448-449 (emphasis added). That holding, the Court emphasized, was "a rule for the rare case," in which a defendant is subjected to a sanction so "overwhelmingly disproportionate to the damages he has caused" that "it constitutes a second punishment." *Id.* at 449, 450.

The Court's holding demonstrates that, "[w]hatever else may be said about" *Halper*, "it d[id] not alter the fundamental principle that an accused must suffer jeopardy before he can suffer double jeopardy." *Serfass* v. *United States*, 420 U.S. at 393. *Halper* did not hold that a "punishment" imposed in a civil proceeding is a "jeopardy" that triggers protection against a later criminal prosecution. Nor did *Halper* hold that whether a proceeding is properly characterized as criminal in nature is *irrelevant* to applicability of the Clause's protections. Instead, *Halper* held that, *when* the defendant has been criminally

prosecuted and punished, the finality branch of the multiple punishments doctrine precludes an increase in the defendant's sentence even when, as a formal matter, the additional punishment would result from a civil statute that is nonpunitive in the great majority of its applications.

The multiple punishments principle that has developed from *Ex parte Lange* to *Halper* turns on the notion that criminal convictions and their resulting sentences, at some point, achieve a degree of finality that is worthy of societal protection. Those cases express the view that once the government has exacted a punishment through the criminal process and has obtained a final judgment, a defendant may not be called upon to bear a second punishment for the same offense, whether the punishment be explicitly criminal, as in *Lange*, or so punitive as to amount to the same result, as in *Halper*. While the use of the Double Jeopardy Clause to protect against multiple punishments has been questioned, see *Department of Revenue of Montana* v. *Kurth Ranch*, 114 S. Ct. at 1955-1959 (Scalia, J., dissenting), what has not been questioned is that the doctrine, as formulated, takes as its predicate an *initial* "jeopardy"—a risk of criminal conviction before a body competent to decide the question of guilt or innocence. In describing the consequences of a final criminal judgment, the doctrine thus belongs to the constitutional "common law" that pertains to the rights that follow from being placed in "jeopardy" in a criminal case. Compare *Ashe* v. *Swenson*, 397 U.S. 436 (1970) (Double Jeopardy Clause embodies "collateral estoppel" doctrine).

In keeping with that understanding, *Halper* repeatedly emphasized the fact of the earlier criminal prosecution, see 490 U.S. at 441, 448-449, 449, and

explained that, "*when the Government already has imposed a criminal penalty* and seeks to impose additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding," *id.* at 451 n.10 (emphasis added). And the Court concluded by stating that "the *only* proscription established by [its] ruling is that the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole." *Id.* at 451 (emphasis added).

Nothing in *Austin* v. *United States*, *supra*, changes the conclusion that an initial "jeopardy"—*i.e.*, a prior criminal prosecution—is a prerequisite to the invocation of the Double Jeopardy Clause. *Austin* did not involve the Double Jeopardy Clause at all. It held that the civil forfeiture provisions at issue in that case (21 U.S.C. 881(a)(4) and (7)) triggered the applicability of the Eighth Amendment's Excessive Fines Clause. The Court expressly distinguished two of its double jeopardy precedents concerning the forfeiture of contraband or goods involved in customs violations, after noting that the forfeitures in both of those cases were remedial. 113 S. Ct. at 2811-2812 (citing *89 Firearms*, 465 U.S. at 364, and *One Lot Emerald Cut Stones*, 409 U.S. at 237). The *Austin* Court did rely on *Halper* in assessing whether *in rem* civil forfeitures could be viewed as a "punishment" that triggers the protections of the Eighth Amendment. 113 S. Ct. at 2805-2806, 2810 n.12, 2812. But *Austin* did not purport to alter *Halper*'s double jeopardy holding as a rule for "the rare case" in which "a prolific but small-gauge offender [was subjected] to a [civil] sanction overwhelmingly disproportionate to the damages he has caused," after having been criminally prosecuted and punished. 490 U.S. at 449.

Department of Revenue of Montana v. *Kurth Ranch*, *supra*, the third case on which the Ninth Circuit relied, does not support, much less "compel[]," 95-346 Pet. App. 25a, that court's interpretation of *Halper* and *Austin*. *Kurth Ranch* mentioned *Austin* only in passing to describe *Austin*'s Eighth Amendment holding, 114 S. Ct. at 1945, and actually held that *Halper* did *not* furnish the proper framework for analyzing the issue before the Court, which was whether the Double Jeopardy Clause barred collection of Montana's tax on the possession of dangerous drugs after the "taxpayers" had been criminally prosecuted and punished. *Id.* at 1948. The Court struck down the tax based on several "unusual features" in the statute that authorized it, which "[t]aken as a whole" rendered the tax "a concoction of anomalies." *Id.* at 1947, 1948. Specifically, the Court found it significant that the statute conditioned liability on commission of a crime, that the tax was due and collectable "only after the taxpayer ha[d] been arrested for the precise conduct that gives rise to the tax obligation in the first place," that the tax was an *in personam* sanction that was exacted after the drugs had been confiscated and destroyed, and that the tax amounted to more than eight times the market value of the drugs. *Id.* at 1947. As the Court noted, "[a] tax on 'possession' of goods that no longer exist and that the taxpayer never lawfully possessed has an unmistakably punitive character" especially when it is "imposed on criminals and no others." *Id.* at 1948.

Those "exceptional" (114 S. Ct. at 1948) features persuaded the Court that the proceeding to collect the tax "was the functional equivalent of a successive criminal prosecution that placed the [taxpayers] in jeopardy a second time 'for the same offence' " for which they had previously been criminally prosecuted. *Ibid.* That holding of *Kurth Ranch*, and the Court's conclusion that the *Halper* test was inapplicable, suggest that the Court viewed the proceeding to collect the tax as "essentially criminal," see *Helvering* v. *Mitchell*, 303 U.S. at 400, and thus that it violated the Double Jeopardy Clause's prohibition on successive criminal *prosecutions*. *Kurth Ranch* therefore may be best understood as falling into the long line of decisions, including *Mitchell*, *Mendoza-Martinez*, and *Ward*, that have considered whether a civil statute is so inherently punitive in nature that the safeguards applicable to criminal prosecutions must be applied. It does not signal a departure from the case-by-case approach adopted in *Halper* in the multiple punishments context, which requires an assessment of the purposes served by a particular sanction as applied to the case at hand. Still less does *Kurth Ranch* dispense with a prior criminal "jeopardy" as a prerequisite for invoking multiple punishments analysis.

The Court's most recent double jeopardy decision, *Witte* v. *United States*, 115 S. Ct. 2199 (1995), also undermines the broad reading of *Halper* and *Kurth Ranch* adopted by the courts below, because it confirms that those cases do not change the long-standing rule that a person must first suffer the risk of conviction for a crime before he may claim any double jeopardy violation. Witte was first convicted of attempting to possess marijuana with intent to distribute it. His sentence for that offense was increased

on the basis of the trial judge's finding that he had also participated in cocaine importation offenses. When Witte was later separately indicted for those cocaine offenses, he sought dismissal of the charges on the ground that he had already been "punished" for them during the sentencing on the marijuana charge. Although Witte relied on *Halper* and *Kurth Ranch*, see Brief for Petitioner at 32-34, *Witte* v *United States*, No. 94-6187 (O.T. 1994), and a broad interpretation of those cases could have supported his claim, see *Witte* v *United States*, 115 S. Ct. at 2209-2210 (Scalia, J., concurring in the judgment); *id.* at 2212-2213 (Stevens, J., concurring in part and dissenting in part), this Court rejected it. The Court noted that Witte "clearly was neither prosecuted nor convicted of the cocaine offenses during the first criminal proceeding," *id.* at 2204, and concluded that he also was not "punished" for those offenses when his earlier sentence was increased, because "for double jeopardy purposes" he could be deemed to have suffered " 'punishment' * * * only for the offense of which [he was] convicted," *id.* at 2205; see also *id.* at 2206. In other words, because Witte was not at risk of conviction for the cocaine offenses when he was sentenced on the marijuana charge, he had failed to meet the threshold predicate for either a multiple prosecutions or a *Halper* multiple punishments claim.

3. The foregoing analysis demonstrates that the Sixth Circuit fundamentally erred by concluding that "jeopardy attached" when respondent Ursery settled the civil forfeiture action, and that this "jeopardy" barred the later jury trial on the criminal charges against him. 95-345 Pet. App. 6a-9a. As we have explained, the concept of "jeopardy" requires a proceeding in which a defendant risks conviction for a

criminal offense, with all the unique consequences that attend that societal judgment. Only a defendant who has suffered that particular type of "intrinsically personal" (*United States* v. *Halper*, 490 U.S. at 447) risk may thereafter lay claim to the "constitutional policy of finality * * * in federal criminal proceedings" (*United States* v. *Jorn*, 400 U.S. at 479 (plurality opinion of Harlan, J.)) that the Double Jeopardy Clause represents. The consent judgment entered in the *in rem* action involving respondent Ursery's property did not subject him to that sort of risk of a criminal trial or punishment; it merely concluded a civil action involving his property.

The Sixth Circuit drew an analogy between that consent judgment and a guilty "plea entered pursuant to a plea agreement." 95-345 Pet. App. 7a. A plea of guilty to a criminal offense, however, "is itself a conviction. Like a verdict of a jury it is conclusive." *Kercheval* v. *United States*, 274 U.S. 220, 223 (1927); accord *United States* v. *Broce*, 488 U.S. 563, 570 (1989). Because Ursery was not placed "in jeopardy" by the judgment entered in the *in rem* civil forfeiture action, he did not meet the threshold requirement for the applicability of *Halper*'s multiple punishments analysis or any other double jeopardy claim. The Sixth Circuit accordingly erred in ordering the dismissal of his later judgment of conviction on double jeopardy grounds.

C. The *In Rem* Civil Forfeitures In These Cases Did Not Impose "Punishment" For Purposes Of The Multiple Punishments Inquiry

The Sixth and Ninth Circuits concluded that the civil forfeiture statutes at issue here necessarily and categorically inflict "punishment" on property owners for purposes of the Double Jeopardy Clause. As we

have shown, under this Court's cases, a "multiple punishments" inquiry is relevant only when a defendant has been criminally prosecuted, convicted, and sentenced. Accordingly, the inquiry should not have been undertaken at all in *Ursery*. Even if such an inquiry were appropriate, however, neither the forfeiture of the property used to facilitate the narcotics crimes in *Ursery* nor the property forfeited as proceeds of narcotics-related crimes in *$405,089.23* should be characterized as "punishment" for purposes of the Double Jeopardy Clause.

1. *The forfeiture of the facilitating property in* Ursery *is not punishment.* Under *United States* v. *Halper*, the issue whether a particular civil sanction amounts to "punishment" within the meaning of the Double Jeopardy Clause turns on an analysis of the sanction's purposes. 490 U.S. at 448. In our view, the proper inquiry in the multiple punishments context is whether, as applied in a particular case, the sanction is rationally related to legitimate remedial aims. In the case of the forfeiture of property that facilitates a crime, we believe that the sanction should generally be regarded as remedial.

a. The "hold[ing]" of *Halper* is that a civil sanction is punitive if it "may not fairly be characterized as remedial, but *only* as a deterrent or retribution." 490 U.S. at 448-449 (emphasis added). Under the holding of *Halper*, a dominant remedial purpose renders a sanction nonpunitive for purposes of the Double Jeopardy Clause, even if the sanction could also be said, in some respects, to act as a deterrent. Thus, *Halper* adopted a "rational-relationship requirement," whereby a sanction is deemed punitive when it "is not rationally related to the [nonpunitive] goal" that it purports to serve. *Id.* at 451 & n.12;

compare *Bell* v. *Wolfish*, 441 U.S. 520, 539 (1979) ("[I]f a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment"); *United States* v. *Salerno*, 481 U.S. 739, 746-747 (1987).

Some language in *Halper* may be read to suggest that a civil sanction with *any* deterrent purpose should be viewed as "punishment." 490 U.S. at 448.[6] In our view, that formulation would sweep too broadly. Such a conception of punishment is not supported by the precedent on which *Halper* relied.[7] And a "test"

[6] The Court stated:

> [w]e have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. See, *e.g.*, *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (these are the "traditional aims of punishment"). Furthermore, "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives." *Bell* v. *Wolfish*, 441 U.S. 520, 539, n. 20 (1979). From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

United States v. *Halper*, 490 U.S. at 448.

[7] The authorities cited by *Halper* in the passage quoted at note 6, *supra*, do not require the conclusion that the presence of a deterrent component in a sanction having multiple purposes is "punishment." *Mendoza-Martinez* listed factors relevant to whether a statute is so penal that it must be viewed as imposing criminal punishment; one of those factors is whether the statute's operation promotes retribution and deterrence. *Bell* v. *Wolfish*, 441 U.S. 520 (1979), the second case cited by *Halper*, used the *Mendoza-Martinez* factors as guideposts to determine whether particular practices of prison

that considers any deterrent purpose to qualify a civil sanction as punishment diverges from the carefully circumscribed approach taken in *Halper*. There are few, if any, civil sanctions that do not serve *in part* to deter, and many are deliberately employed in part for that purpose. The view that any deterrent element means punishment would be inconsistent with the *Halper* Court's own emphasis on the limited scope of its ruling. See *id.* at 449, 450; see also *Kurth Ranch*, 114 S. Ct. at 1946.

Austin, however, relied on the broader formulation in *Halper* in holding that the forfeiture of property used to facilitate narcotics offenses is sufficiently punitive to warrant application of the Eighth Amendment's prohibition of excessive fines. 113 S. Ct. at 2806, 2810 & n.12, 2812. After noting various historical and contemporary features of forfeiture statutes that it viewed as signaling a punitive purpose,[8]

administrators were "punishment." While the Court in *Bell* v. *Wolfish* did state generally that retribution and deterrence are punitive purposes, its overall test for measuring the nature of a sanction did not require that *any* element of deterrence makes a sanction punitive. Rather, *Bell* v. *Wolfish* states: "[I]f a particular condition or restriction * * * is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'" 441 U.S. at 539.

[8] *Austin* found that *in rem* forfeitures "historically have been understood, at least in part, as punishment," 113 S. Ct. at 2810, and that nothing in 21 U.S.C. 881(a)(4) and (7) affirmatively dispelled that understanding. On the contrary, the Court noted that those subsections contain innocent-owner defenses that "serve to focus the provisions on the culpability of the owner in a way that makes them look more like punishment," that Congress "has chosen to tie forfeiture directly to the commission of drug offenses," and that the legislative

the Court stated that, even on the assumption that forfeiting the instrumentalities of crime serves "some remedial purpose," the Eighth Amendment would still apply to those forfeitures because the Court could not conclude that they "serve[] *solely* a remedial purpose." *Id.* at 2812 (emphasis added). The Court should not apply that test here.

The sole question in *Austin* was whether the Excessive Fines Clause of the Eighth Amendment applies to *in rem* forfeitures, and the Court could have answered that question without reference to *Halper*'s language at all. The dictionary definition of a "fine" —a "payment to a sovereign as punishment for some offense," 113 S. Ct. at 2812—does not require that punishment be the *sole* reason for a particular levy, and the Court concluded that the Framers understood the words "fine" and "forfeiture" to be synonymous. *Id.* at 2808 & n.7. Moreover, *Austin* expressly recognized that it "ma[d]e little practical difference" in that case whether the Excessive Fines Clause were held to apply to all forfeitures under the statutes at issue in that case, "or only to those that cannot be characterized as purely remedial." *Id.* at 2812 n.14. The practical consequences of applying the Eighth Amendment occur only when a fine is excessive, and "a fine that serve[d] purely remedial purposes [could not] be considered 'excessive' in any event." *Ibid.*

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history of those provisions characterized them as a "powerful deterrent." 113 S. Ct. at 2810-2811. The Court was also unpersuaded that conveyances used to commit drug crimes can be compared to "contraband," the forfeiture of which is concededly remedial, or that the forfeiture of such property furnishes a reasonable form of liquidated damages, since its value may vary dramatically. *Id.* at 2811-2812.

The extension of *Austin*'s reasoning, however, to the double jeopardy setting would have significant practical consequences. In that setting, a categorical conclusion that all civil forfeitures under the statute at issue constitute punishment would defeat the case-by-case approach adopted in *Halper* itself.[9] It could also completely bar a later criminal prosecution of the property owner, even if the *particular* prior civil forfeiture were fairly characterized as substantively remedial. That result would greatly expand *Halper*'s rule "for the rare case." 490 U.S. at 449. And if *Austin*'s formulation were extended to other contexts, it could cast unwarranted doubt on the constitutionality of practices that have long been thought entirely proper, see, *e.g.*, *State* v. *Hickam*, 668 A.2d 1321 (Conn. 1995) (double jeopardy challenge to DWI prosecution that followed suspension of motorist's license), would lead to increased litigation about matters unrelated to the basic concerns of the relevant constitutional provision, and likely would ultimately prove unworkable. Cf. *Sandin* v. *Conner*, 115 S. Ct. 2293, 2300 & n.5 (1995).[10]

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[9] Under *Halper*'s approach, only so much of a sanction as constitutes punishment would be barred by a criminal conviction for the same offense. 490 U.S. at 449-450, 452; cf. *Morris* v. *Mathews*, 475 U.S. 237, 244-247 (1986). Under the categorical approach, *all* of the sanction would presumably be barred.

[10] That the analysis of whether punishment is imposed may differ in the excessive fines and double jeopardy contexts is consistent with this Court's general treatment of forfeiture issues. Indeed, if anything is clear from this Court's cases, it is that this Court's characterization of forfeiture as either punitive or remedial has depended upon the specific legal context in which that question arose. Thus, in *Boyd* v. *United States*, 116 U.S. 616, 634 (1886), and *United States* v. *United*

The mainstream of this Court's cases supports *Halper*'s actual holding that a sanction is punitive only if it cannot rationally be explained by reference to a nonpunitive interest. See, *e.g.*, *Bell* v. *Wolfish*, 441 U.S. at 539. Just one Term after *Austin*, the majority in *Kurth Ranch* recognized that in the double jeopardy context even "an obvious deterrent purpose" does not necessarily mark government practices as "punishment." 114 S. Ct. at 1946. Two of the dissenting Justices in *Kurth Ranch*, who voted for the result in *Austin*, expressly reaffirmed the more limited formulation reflected in *Halper*'s holding. See *id.* at 1952 (Rehnquist, C.J., dissenting) ("[T]he proper inquiry is * * * whether [the tax] is so high that it can only be explained as serving a punitive purpose"); *id.* at 1953 (O'Connor, J., dissenting) ("Our double jeopardy cases make clear that a civil sanction will be considered punishment to the extent that it serves only the purposes of retribution and deterrence, as opposed to furthering any nonpunitive objective").

In addition, while *Austin* relied on several factors in concluding that the forfeiture of instrumentalities of drug crimes is sufficiently punitive to trigger

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States Coin & Currency, 401 U.S. 715, 718 (1971), the Court characterized forfeiture as "criminal in nature" for purposes of determining whether a claimant in a forfeiture action could invoke the Fifth Amendment privilege against self-incrimination. See also *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700-702 (1965) (finding, in light of forfeiture's role as a penalty, that Fourth Amendment's exclusionary rule applies). Subsequently, however, in *One Lot Emerald Cut Stones* and *89 Firearms*, the Court reaffirmed the rule that *in rem* forfeitures serve substantial remedial ends and do not constitute punishment for double jeopardy purposes.

Eighth Amendment scrutiny, those factors have never traditionally been held sufficient to brand such forfeitures as punitive for purposes of the Double Jeopardy Clause. For example, while a statutory innocent-owner defense is of relatively recent vintage, equivalent administrative mitigation remedies that depend on the absence of "willful negligence" on the part of property owners have been available since 1790. See *Calero-Toledo*, 416 U.S. at 689 n.27. Similarly, a historical understanding of a particular sanction as "punishment" is one of the several *Mendoza-Martinez* factors that this Court in *89 Firearms* concluded was *not* implicated by an *in rem* forfeiture. See *89 Firearms*, 465 U.S. at 365 & n.7. Finally, while forfeitures of "facilitating property" are tied to the commission of certain crimes, their scope is much broader because they apply to property "intended" to be used in those crimes even if such an "intent" is not itself a crime. Cf. *id.* at 363-364. In any event, under *Halper* the last-mentioned factor merits minimal weight in the double jeopardy calculus, because in that case the defendant became liable for a civil penalty only after engaging in conduct that also constituted a crime, see *United States* v. *Halper*, 490 U.S. at 438; see also *United States ex rel. Marcus* v. *Hess*, 317 U.S. at 549; *Murphy* v. *United States*, 272 U.S. 630, 632 (1926) (Holmes, J.), yet the Court nevertheless concluded that a civil penalty amounts to punishment only when it is so disproportionate to the government's claimed interest in compensation that it cannot rationally be justified, on a case-by-case basis, by reference to that interest. 490 U.S. at 449.[11]

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[11] The Court in *Austin* also consulted the legislative history of the drug forfeiture statutes, noting that the Senate Report

b. Applying *Halper*, the appropriate case-by-case inquiry in the context of forfeitures of property used to facilitate narcotics crimes is whether the nexus between the particular property and the crime committed or intended is close enough so that the forfeiture may rationally be thought to further one or more of the remedial goals that traditionally have justified that *in rem* remedy. Those goals are (1) inducing owners to exercise all reasonable care in managing their property, see, *e.g.*, *Calero-Toledo*, 416 U.S. at 687-688; *Van Oster*, 272 U.S. at 467-468; (2) abating a nuisance or wrong,[12] see, *e.g.*, *Dob-*

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had characterized the forfeiture of real property used for drug storage or manufacture as a "powerful deterrent." 113 S. Ct. at 2811 (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 195 (1983)). As we argue above, however, the presence of some deterrent objective should not result in civil forfeiture being deemed categorically punitive for double jeopardy purposes.

[12] The reported cases provide graphic examples of the use of 21 U.S.C. 881(a)(7) to meet this traditional objective of *in rem* forfeitures. In *United States* v. *141st Street Corp.*, 911 F.2d 870 (2d Cir. 1990), cert. denied, 498 U.S. 1109 (1991), nearly an entire apartment building was used to sell crack cocaine, and persistent efforts to compel the legal owners of the building to remedy the situation had failed. See *id.* at 873. Similarly, conveyances forfeitable under 21 U.S.C. 881(a)(4) may be specially adapted to smuggle drugs, and the removal of such a conveyance from commerce undeniably serves a remedial purpose. See *United States* v. *One 1983 Homemade Vessel Named "Barracuda"*, 858 F.2d 643 (11th Cir. 1988); cf. *United States* v. *Chandler*, 36 F.3d 358, 364 (4th Cir. 1994) ("Forfeiture of a $14 million yacht, specially outfitted with high-powered motors, radar, and secret compartments for the sole purpose of transporting drugs from a foreign country into the United States, would probably offend no one's sense of excessiveness"), cert. denied, 115 S. Ct. 1792 (1995).

bin's Distillery, 96 U.S. at 400; *United States* v. *Cargo of Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844); and (3) "insuring an indemnity to the injured party," *United States* v. *Cargo of Brig Malek Adhel*, 43 U.S. (2 How.) at 233; see *Republic National Bank* v. *United States*, 506 U.S. 80, 87 (1992) (*in rem* forfeiture developed, in part, "to furnish remedies for aggrieved parties"). The last objective —compensating an injured party—extends as well to the government, see *United States ex rel. Marcus* v. *Hess*, 317 U.S. at 551, which may fairly ask that each person whose property contributes to the harms caused by drug trafficking also contribute to defraying the government's costs of enforcement and the societal harms created by that activity. Cf. *Halper*, 490 U.S. at 446 n.6 (government may recover its "investigative and prosecutorial costs"); *Kurth Ranch*, 114 S. Ct. at 1953-1954 (O'Connor, J., dissenting); *United States* v. *Certain Real Property & Premises Known as 38 Whalers Cove Drive*, 954 F.2d 29, 37 (2d Cir.) (government may be allowed "[a] reasonable allocation of more generalized enforcement costs—in the nature of overhead"), cert. denied, 506 U.S. 815 (1992).

In general, we believe that the forfeiture of the instrumentalities of crime is a rational means to achieve those remedial goals, and that it would take a "rare case," *Halper*, 490 U.S. at 449, to establish otherwise.[13] Such a rare case might occur if

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[13] In the course of its Eighth Amendment analysis, the *Austin* Court did express doubt that, as a categorical matter, the forfeiture of instrumentalities of crime could be characterized as remedial. 113 S. Ct. at 2811. The Court declined to equate conveyances and buildings involved in drug crimes

extremely valuable property were minimally involved in the offense, such that the forfeiture would be rationally explicable only on the basis that it is intended to impose punishment for the purposes of the Double Jeopardy Clause. Short of that situation, however, a court should not reach the conclusion that a forfeiture of facilitating property is punitive for double jeopardy purposes.

In light of those principles, respondent Ursery cannot meet his initial burden (*United States* v. *Halper*, 490 U.S. at 449) of establishing that the government's action in seeking forfeiture of his property was apparently punitive. Because respondent used the property for several years to process and distribute a controlled substance, it significantly furthered the harms occasioned by drug trafficking. And because respondent made no showing that a forfeiture valued at $13,250 represented a recovery "exponentially" in excess of the government's likely costs of enforcement, see *id.* at 445, the government's action in seeking its forfeiture appears rationally to serve the traditional remedial goals of *in rem* forfeiture. Nothing in that action, therefore, suggests that the

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to "contraband," and it found that the value of the property forfeitable on an instrumentality theory has no correlation to the harm caused by the underlying offense or to the costs of law enforcement. *Id.* at 2811-2812. On the case-by-case analysis applicable in the double jeopardy multiple punishments setting, see *United States* v. *Halper*, 490 U.S. at 452, however, the forfeiture of particular property may be integrally tied to the eradication of drug crime (see note 12, *supra*), and the nexus between the property's value and the costs of law enforcement may provide the "rough remedial justice," *id.* at 446, to which the government is entitled. Those purposes would characterize the forfeiture as remedial.

forfeiture could rationally be explained only as an attempt to inflict punishment.

2. *The forfeiture of proceeds is not punishment.* Even if the Court disagrees with our submission that *Austin* does not control the punishment question presented in *Ursery*, and holds that the civil action in that case inflicted "punishment" for double jeopardy purposes, we believe that a different conclusion nonetheless is required in *$405,089.23*. The district court in that case granted summary judgment in our favor on the ground, among others, that the assets at issue were "proceeds" of narcotics trafficking. See Pet. App. 3a-4a. As a plurality of this Court recognized in *92 Buena Vista Ave.*, *supra*, statutes authorizing the forfeiture of "proceeds" are a recent development in forfeiture law. See 113 S. Ct. at 1133-1134 & n.16 (noting that first such statute was enacted in 1978). Accordingly, *Austin*'s historical analysis of *in rem* forfeitures as being "in part" punitive (113 S. Ct. at 2810) does not speak to this category of relief sought by the government.

The "forfeiture of proceeds from illegal drug sales is more closely akin to the seizure of the proceeds from the robbery of a federal bank than the seizure of lawfully derived real property." *United States* v. *Tilley*, 18 F.3d 295, 300 (5th Cir.), cert. denied, 115 S. Ct. 573, 574 (1994); cf. *92 Buena Vista Ave.*, 113 S. Ct. at 1133 n.15 (noting that "stolen property—the fruits of crime—was always subject to seizure" under the Fourth Amendment); *Caplin & Drysdale, Chtd.* v. *United States*, 491 U.S. 617, 626 (1989) ("[T]he Government does not violate the Sixth Amendment if it seizes the robbery proceeds and refuses to permit the defendant to use them to pay for his defense"). When the government forfeits

such proceeds, it does no more than prevent unjust enrichment, a plainly remedial goal. See, *e.g.*, *United States* v. *Carson*, 52 F.3d 1173, 1182-1183 (2d Cir. 1995) (disgorgement order in civil RICO case is not "punishment" for double jeopardy purposes because "[d]isgorgement, by design, is compensatory"), cert. denied, No. 95-6929 (Feb. 20, 1996); *SEC* v. *Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994) (disgorgement of profits made during securities law violation is purely remedial); see also *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 153-154 & n.6 (1956). Any other view would lead to the absurd result that a bank robber who is arrested as he exits the bank, and from whom the stolen money is seized at that time, may not thereafter be prosecuted for the robbery.

As the Fifth Circuit has explained,

> [w]hen * * * the property taken by the government was not derived from lawful activities, the forfeiting party loses nothing to which the law ever entitled him. * * * The possessor of proceeds from illegal drug sales never invested honest labor or other lawfully derived property to obtain the subsequently forfeited proceeds. Consequently, he has no reasonable expectation that the law will protect, condone, or even allow, his continued possession of such proceeds because they have their very genesis in illegal activity.

United States v. *Tilley*, 18 F.3d at 300; accord *United States* v. *Salinas*, 65 F.3d 551, 553-554 (6th Cir. 1995) (following *Tilley*); *United States* v. *$184,505.01*, 72 F.3d 1160 (3d Cir. 1995) (same); see also *United States* v. *Clementi*, 70 F.3d 997, 999-1000 (8th Cir. 1995) (rejecting Ninth Circuit's analysis); but see *United States* v. *9844 South Titan Court*, No. 94-1285, 1996 WL 49002 (10th Cir. Feb. 5, 1996). Moreover, while the Court was not persuaded in *Austin* that lawfully acquired property that is used merely to facilitate a crime should be viewed as contraband, property received in exchange for controlled substances bears a much closer nexus to the illegality and may, as Judge Rymer argued below, fairly be characterized as "the functional equivalent of contraband," 95-346 Pet. App. 27a, the forfeiture of which is "remedial." *Austin* v. *United States*, 113 S. Ct. at 2811. Finally, as the Seventh Circuit recently recognized,

> proceeds forfeitures can never be out of proportion to the "loss" suffered by the government or society. If there has been a finding that certain property, for instance, is forfeitable pursuant to § 881[a](6) as proceeds of drug trafficking, it is directly equal to that part of the profits with which it was purchased. It directly represents at least a portion of the profits and can thus be less than or equal to society's loss, but not more than the loss. * * * That being the case, the forfeiture of proceeds acquired from drug dealing can hardly be termed punishment.

Smith v. *United States*, No. 95-2259, 1996 WL 72858, at *3 (Feb. 21, 1996).

For these reasons, the Ninth Circuit's conclusion that the forfeiture of the proceeds that respondents obtained from years of drug dealing is punishment simply "has to be wrong." 95-346 Pet. App. 28a (Rymer, J., dissenting from denial of rehearing). Instead, the forfeitures at issue in *$405,089.23* are remedial, and they cannot constitute punishment under the Double Jeopardy Clause.

D. If Civil *In Rem* Forfeiture Amounts To An "Offense" For Which Respondents Were Placed In Jeopardy, It Is Not The "Same Offense" As The Crimes For Which They Were Prosecuted

1. The Double Jeopardy Clause prohibits multiple punishments or successive prosecutions only for the "same offence." The test for determining whether two offenses are the "same" for double jeopardy purposes is the "statutory elements" test set forth in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932): "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." See also *Brown* v. *Ohio*, 432 U.S. 161, 166 (1977) ("Th[e] [*Blockburger*] test emphasizes the elements of the two crimes"). Accordingly, if each statute at issue "requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975); see also *United States* v. *Felix*, 503 U.S. 378, 386 (1992) ("[A] mere overlap in proof between two prosecutions does not establish a double jeopardy violation"); *Albernaz* v. *United States*, 450 U.S. 333, 338 (1981). The *Blockburger* test applies in both the multiple punishments and successive prosecutions contexts. See *United States* v. *Dixon*, 113 S. Ct. at 2856; *Witte* v. *United States*, 115 S. Ct. at 2204.

2. A straightforward application of the *Blockburger* test compels the conclusion that, if civil forfeiture amounts to an "offense" that triggers double

jeopardy protections, as both the Sixth and Ninth Circuits have held, the "offense" punished in the forfeiture proceedings at issue here is not the "same offense" as any of the offenses on which respondents were convicted. Each of the forfeiture statutes requires proof that the defendant property played some role in the commission of a crime. Section 981(a)(1)(A) provides for the forfeiture of "property * * * involved in a transaction or attempted transaction," in violation of four money laundering statutes. Section 881(a)(6) authorizes the forfeiture of money "furnished or intended to be furnished" in connection with, "traceable to," or "used or intended to be used to facilitate" a drug trafficking crime. Similarly, Section 881(a)(7) requires proof that the defendant real property was "used, or intended to be used, * * * to commit, or to facilitate the commission of," a drug crime.

The respondents in *$405,089.23* were convicted of conspiracy to commit drug offenses, in violation of 21 U.S.C. 846; possession of a controlled substance with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1); conspiracy to launder monetary instruments, in violation of 18 U.S.C. 371; and money laundering, in violation of 18 U.S.C. 1956. The respondent in *Ursery* was convicted of manufacturing marijuana, in violation of 21 U.S.C. 841(a)(1). None of those statutes requires proof that any property was used in or generated by the offense. Because each of the forfeiture statutes does require that element of proof, each contains an element that the criminal statutes do not.

Each of the criminal statutes also requires proof of at least one element not found in the forfeiture statutes. Conviction on the criminal charges required

proof that respondents participated in a conspiracy, possessed a controlled substance with the intent to distribute it, or engaged in unlawful money laundering transactions. By contrast, the forfeiture statutes do not require proof of any particular crime, or proof of the participation of the property owner in the offenses that supported the forfeiture, much less proof that the owner entertained a mental state required for a criminal conviction.[14] See *Origet* v. *United States*, 125 U.S. 240, 246 (1888) ("The person punished for the [criminal] offence may be an entirely different person from the owner of the merchandise, or any person interested in it"); *United States* v *Chandler*, 36 F.3d 358, 362 (4th Cir. 1994), cert. denied, 115 S. Ct. 1792 (1995). Indeed, because the government may obtain forfeiture under Section 881(a)(6) and (7) of property that was merely "intended" for use in a drug offense, forfeiture under those subsections may occur even if no crime actually was committed by anyone.

For those reasons, there is no force to the Ninth and Sixth Circuits' view that, since forfeiture statutes "incorporate the elements of criminal offenses, forfeitures pursuant to them constitute a species of greater offenses with respect to the lesser-included offenses that form the bases of the forfeitures." *United States* v. *One 1978 Piper Cherokee Aircraft*, 37 F.3d 489, 495 (9th Cir. 1994); see also 95-345 Pet. App. 12a. Greater- and lesser-included offenses are the "same" for double jeopardy purposes because such of-

[14] Thus, for example, an owner of property may be legally innocent of the crime that gives rise to the civil forfeiture, but be unable to meet the requirements of the statutory innocent-owner defense.

fenses do not satisfy the *Blockburger* test. As this Court has made clear, one statute does not define a lesser-included offense of another unless every violation of the statute defining the greater offense "*necessarily* entails a violation of" the statute defining the lesser offense. *United States* v. *Woodward*, 469 U.S. 105, 107 (1985) (per curiam) (emphasis added); *Brown* v. *Ohio*, 432 U.S. at 168 (offense is lesser-included under *Blockburger* if it is "invariably true" that the lesser offense "requires no proof beyond that which is required for conviction of the greater"); see also *Schmuck* v. *United States*, 489 U.S. 705, 716, 719 (1989). Because that quite clearly cannot be said of the purportedly "greater" civil forfeiture "offenses" at issue here, the courts below erred in concluding that those offenses are the "same" as the crimes for which respondents were convicted.[15]

[15] Apart from misapplying the "elements" test of the *Blockburger* decision (*i.e.*, whether the "offenses" are the same *in law*), the Sixth Circuit in *Ursery* also ignored a second, and equally dispositive, aspect of the *Blockburger* decision, *viz.*, whether the offenses at issue are the same *in fact*. While the better-known holding of *Blockburger* is addressed to the former question, that case also held that repeated violations of the *same* statute (which obviously would be the same offense under the "elements" test) are still different "offenses" if each resulted from a fresh "impulse." *Blockburger* v. *United States*, 284 U.S. at 301-303; see also *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 224-225 (1952); *id.* at 220 n.3 (referring to that aspect of *Blockburger* as addressing what the "unit of prosecution" is). Respondent Ursery was not charged with, or convicted of, manufacturing marijuana based on any theory that he grew the plants on his property, or that he did so more than once, but rather on the basis that he did so in property belonging to one of his neighbors and on a specific date—July 30, 1992. As Judge Milburn noted in dissent (95-345 Pet. App. 26a-27a; see also

E. If Respondents Were "Punished" By The *In Rem* Civil Forfeiture Proceedings For The Same Offenses That Led To Their Criminal Convictions, That Punishment Occurred In The "Same Proceeding" As The Punishment Imposed By The Criminal Judgments

Even if the forfeitures in these cases constituted "punishment" for the offenses for which the claimants were convicted, the "Double Jeopardy Clause simply is not implicated" if the criminal action was part of the same "proceeding" as the forfeiture action, because in a single proceeding "the multiple-punishment issue would be limited to ensuring that the total punishment did not exceed that authorized by the legislature." *United States* v. *Halper*, 490 U.S. at 450; see also *Missouri* v. *Hunter*, 459 U.S. at 368-369. The Ninth Circuit concluded that parallel civil forfeitures and criminal convictions, being separately docketed and tried, can never be the same proceeding. 95-346 Pet. App. 7a-12a. The Sixth Circuit did not "fully adopt" the Ninth Circuit's approach, but it did hold that the civil and criminal actions were separate proceedings because they were filed four months apart, ended in formally separate judgments entered by different judges, and were not coordinated by the government attorneys involved. 95-345 Pet. App. 16a.

The courts below misapprehended the significance of *Halper*'s reliance on the existence of "separate" proceedings. Because the multiple punishments doctrine protects a criminal defendant's legitimate "ex-

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id. at 29a), the civil forfeiture action, by contrast, was based on respondent's use of his own property to facilitate the processing and distribution of marijuana over the period of "several years" that concluded with the search of his residence.

pectation of finality in the original sentence," *United States* v. *DiFrancesco*, 449 U.S. at 139; *id.* at 137; *Pennsylvania* v. *Goldhammer*, 474 U.S. at 30; see also *United States* v. *Fogel*, 829 F.2d 77, 83-88 (D.C. Cir. 1987) (Bork, J.), a proceeding is impermissibly successive for purposes of that doctrine only when it is commenced after that expectation of finality has ripened. As demonstrated by this Court's cases upholding the government's authority to appeal criminal sentences, the time at which that expectation ripens has nothing to do with whether an increase in the defendant's sentence is ordered by a different judge, is procured by a different government attorney, or is ordered under the caption of a new docket number. Those are common occurrences upon the hearing of any sentencing appeal, and they do not render the appeal a "separate" proceeding at which punishment is impermissibly increased.

Indeed, *Halper* itself compels the conclusion that such factors cannot control whether a proceeding is impermissibly successive for purposes of the multiple punishments inquiry, because the Court expressly stated that "[n]othing in [its] ruling" would preclude the government from obtaining a "civil penalty" *and* "criminal penalties in the same proceeding." 490 U.S. at 450. Because civil and criminal actions cannot be (and never have been) joined together in a single trial under our system of justice, see *United States* v. *Millan*, 2 F.3d 17, 20 (2d Cir. 1993), cert. denied, 114 S. Ct. 922 (1994); see also *United States* v. *One Single Family Residence*, 13 F.3d 1493, 1499 (11th Cir. 1994); *United States* v. *Smith*, No. 95-1568, 1996 WL 34552 (8th Cir. Jan. 31, 1996), slip op. 6, *Halper* itself casts considerable doubt on the

Ninth and Sixth Circuits' approach to the question.[16] And because *Halper* specifically contemplated that the government could seek *both* civil and criminal penalties, that case also answers the Ninth Circuit's suggestion (95-346 Pet. App. 22a) that this Court's cases effectively require the government to elect whether it will proceed criminally *or* civilly.[17]

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[16] Even in the context of purely criminal proceedings, it is not invariably true that formally separate criminal trials involving the same offense amount to "separate" proceedings that trigger double jeopardy protections. See *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294, 309 (1984) (two-tier state system, even if "technically" resulting in two trials, "can be regarded as * * * a single, continuous course of judicial proceedings" that does not implicate the concerns of the Double Jeopardy Clause); see also *Ohio* v. *Johnson*, 467 U.S. 493, 500-501 (1984) (no double jeopardy violation to continue prosecution on remaining charges in indictment after defendant chose to plead guilty to lesser-included offenses).

[17] The Ninth Circuit suggested that the government could have sought criminal forfeiture under 18 U.S. 982 and 3554 and 21 U.S.C. 853, and simply added a forfeiture count to the criminal indictment. 95-346 Pet. App. 8a-9a. The issue, however, is whether the Double Jeopardy Clause *requires* that the government do so, not whether the government might, in future cases, find ways to mitigate the Ninth Circuit's erroneous interpretation of the Constitution. Moreover, the vast majority of civil forfeiture statutes have no criminal forfeiture analogue. See U.S. Dep't of Justice, *Compilation of Selected Federal Asset Forfeiture Statutes* (Aug. 1995). As a practical matter, the Ninth Circuit's analysis requires the government to choose between a criminal sentence of imprisonment or fine, on the one hand, and civil forfeiture, on the other, even though Congress quite clearly intended for both to be available.

In any event, the Ninth Circuit overlooked the fact that forfeiture under those provisions is an *in personam* action

As with other double jeopardy questions, the relevant inquiry instead is whether the government's conduct "constitute[s] 'governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect.'" *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294, 310 (1984) (quoting *United States* v. *Scott*, 437 U.S. at 91); accord *Ohio* v. *Johnson*, 467 U.S. 493, 502 (1984); *United States* v. *DiFrancesco*, 449 U.S. at 142. In the context of the interests protected by the multiple punishments doctrine, that type of "oppression" occurs only when the government defeats the defendant's legitimate expectation of finality. The facts of these cases make clear that respondents were well aware that the government intended to seek a full complement of statutorily authorized remedies in civil and criminal actions that were basically contemporaneous. Thus, respondents had actual notice that the criminal sentence would not be the sole sanction sought by the government on the basis of their criminal conduct, and thus they could not reasonably have formed any expectation to the contrary. For that reason, the facts of these cases do not implicate *Halper*'s basic concern that the government is seeking to disturb an

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that does not uniformly achieve the ends that Congress envisioned for *in rem* forfeitures. For example, because an *in personam* forfeiture must be obtained in a criminal trial, it is not available when the criminal defendant/property owner is a fugitive from justice, whose trial may not proceed *in absentia*. See *Crosby* v. *United States*, 506 U.S. 255 (1993). Thus, under the ruling below, if a fugitive owns a crack cocaine-infested tenement, the government has the choice of abating the nuisance through a civil proceeding *in rem*, but only if it is willing to risk granting him immunity from prosecution in the event he ultimately is caught.

otherwise final criminal judgment because "it is dissatisfied" with the criminal sentence received by the defendant. *United States* v. *Halper*, 490 U.S. at 451 n.10; see also *United States* v. *Smith*, slip op. 6.

Indeed, the facts of these cases conclusively show that the government did not commence separate civil and criminal actions to defeat any expectation of finality to which respondents were legitimately entitled by virtue of the Double Jeopardy Clause. In *$405,098.23*, the government filed the forfeiture complaint five days after the claimants were charged in a superseding indictment with drug-trafficking and money-laundering offenses. Far from viewing that dual filing as an abusive tactic warranting legal relief, respondents discussed the appropriateness of staying the civil action pending the outcome of the criminal case (95-346 Pet. App. 51a). They thus evidenced not only their own inability to discern any double jeopardy injury from the government's dual filings (to which they did not object at all until the case was on appeal, see *id.* at 5a n.1) but also their willingness to deal with the criminal and civil actions seriatim. Cf. *Jeffers* v. *United States*, 432 U.S. 137, 154 (1977) (plurality opinion of Blackmun, J.).

Similarly, respondent in *Ursery* was indicted in February 1993, four months after the civil forfeiture action was commenced and long before the outcome of either case could be known. He likewise did not see in the parallel actions any danger to his double jeopardy rights. To the contrary, he elected to settle the forfeiture action, with full knowledge of the pendency of the criminal prosecution, and then stood trial on the criminal charges without raising any double jeopardy issue. It was not until after he was

convicted by a jury that he made a double jeopardy claim for the first time. See 95-345 Pet. App. 4a. The unfolding of those events may well suggest that respondent, after concluding a bargain he thought fair and equitable in the civil case and unsuccessfully trying his luck with the jury in the criminal case, turned to the Double Jeopardy Clause for the "sword" (*Ohio* v. *Johnson*, 467 U.S. at 502) that might rescue him from "the consequences of his voluntary choice[s]" (*United States* v. *Scott*, 437 U.S. at 99). Those events do not, however, bespeak the type of "governmental overreaching that double jeopardy is supposed to prevent." *Ohio* v. *Johnson*, 467 U.S. at 502.

CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 1996

☆ U. S. GOVERNMENT PRINTING OFFICE: 1996 409017 40078

No. 95-346

In the Supreme Court of the United States

OCTOBER TERM 1995

UNITED STATES, PETITIONER,

v.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET AL., RESPONDENTS

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Did the *in rem* forfeitures of respondents' property under 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) violate the Fifth Amendment's protection against being twice placed in jeopardy of punishment for the same offense?

a. Do *in rem* forfeitures constitute "punishment," even if premised, *inter alia,* on a "proceeds" theory?

b. Did the government seek the forfeitures in a proceeding "separate" from the underlying criminal prosecution and sentencing?

c. Was the government's attempt to forfeit respondents' property premised on the "same offence" as respondents' criminal convictions, for which they were already serving life imprisonment?

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COUNTERSTATEMENT OF THE CASE

On June 12, 1991, a grand jury sitting in the Central District of California indicted respondents for conspiracy to manufacture methamphetamine [21 U.S.C. § 846], and 19 counts of money laundering [18 U.S.C. § 1956(a)(1)]. Pet. App. 79a-105a.

On June 17, 1991, the Petitioner commenced a civil forfeiture action against the defendant properties listed in the caption (hereinafter "the properties"). Pet. App. 30a-31a. The civil complaint alleged the same facts and same criminal violations set forth in the criminal indictment against respondents Arlt, Wren, and others. Pet. App. 33a-42a, 79a-105a. The government invoked *in rem* forfeiture statutes 21. U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) in the civil complaint. Petitioner has maintained possession of the properties since their seizure in July, 1991.

On March 27, 1992, respondents Arlt, Wren, and others were found guilty of the indictment charges. Pet. App. 106a-108a. On December 4, 1992, while Arlt and Wren were serving their sentences in prison, the government filed its motion for summary judgment in the forfeiture action. Resp. Arlt's Br. in Opp. 1a-29a. The government's "uncontroverted facts and conclusion of law" established its probable cause burden by using the criminal indictment, prosecution, jury verdict, and judgment and commitment as the grounds for summary judgment in the civil proceedings. Pet. App. 55a-72a.

On January 26, 1993, respondents Arlt and Wren, *pro se*, opposed the government's motion for summary judgment by vigorously disputing the government's alleged "uncontroverted facts." Resp. Arlt's Br. in Opp. 48a-54a. Respondents raised material questions of fact regarding whether the cash transactions were legal in themselves. Resp. Arlt's Br. in Opp. 31a-34a, 50a-52a.

On March 23, 1993, respondents Arlt and Wren moved to strike portions of the government's reply to claimants'

opposition to motion for summary judgment. Resp. Arlt's Br. in Opp. 58a-70a. Respondents' declaration and exhibits demonstrated a legal source of the vehicles, boat, airplane, personal property, silver bars, and money in several accounts. Resp. Arlt's Br. in Opp. 48a-52a. Respondents demonstrated the legal procedure they used when making chemical orders or cash purchases, and contended that use of cash is normal and not *per se* proof of mysterious drug activity. *Id.* The only fact not in dispute was that the government met its burden of proof of the probable cause for forfeiture based on precisely the same conduct and violation as in the criminal indictment, prosecution, and convictions of respondents Arlt and Wren. Pet. App. 61a-72a; Resp. Arlt's Br. in Opp. 58a-68a.

On April 1, 1993, the district court granted the government's motion for summary judgment and adopted in full the government's allegations in its "uncontroverted facts and conclusions of law" which incorporated the indictment and criminal prosecution. Pet. App. 75a-78a. Following the district court's denial of respondents' request for reconsideration, respondents filed a timely notice of appeal on June 15, 1993. The government argued, *inter alia*, that its burden of proof (probable cause) was satisfied by Arlt's and Wren's criminal indictment, prosecution, and convictions for the offenses underlying this forfeiture complaint. Resp. Arlt's Br. in Opp. 113a-114a.

On September 6, 1994, the Ninth Circuit panel ruled that multiple punishment occurred when a civil forfeiture under either 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) is based on the same conduct as the claimants' criminal judgment and sentence. Pet. App. 1a-23a. The panel did not reach the merits of the respondents' other claims, but stated in footnote 2:

> Although the claimants relief would be incomplete if we were to rest our decision on probable cause, and thus we do not reach that ground, it seems clear that the government lacked such cause for the institution of these proceedings. In seeking to satisfy its probable cause

> burden the government relies almost exclusively on Arlt's and Wren's criminal convictions.

Pet. App. 5a; see also Pet. App. 18a. The decision stated that the government invited the double jeopardy problem in order to "obtain a significant advantage":

> [I]f it succeeded in the criminal case it could obtain summary judgment based on the conviction (assuming that it had probable cause at the time it instituted the forfeiture action), while if it lost it could still seek forfeiture and urge that the more lenient standard applicable in civil proceeds applied. See 1 David B. Smith, *Prosecution and Defense of Forfeiture Case*, ¶ 10.01, at 10-4 to 10-5 (1993).

33 F.3d at 1217; Pet. App. 9a-10a.

In a footnote, the panel specifically noted the threatened abuses of the type of successive employed by the petitioners. Pet. App. 10a, n.6.

The government sought rehearing on October 14, 1994. The panel affirmed its opinion and amended with a one sentence notation that its categorical approach characterizing § 881(a)(6) as punishment was compelled by this Court's decision in *Dept. of Revenue of Montana v. Kurth Ranch*, 114 S.Ct. 1937 (1994). Pet. App. 25a. A dissent from the rehearing denial raised legal objections to the characterization of proceeds forfeitures as punishment and posed the specter of wholesale jail releases. Pet. App. 25a-29a.

The government filed its petition for certiorari on August 29, 1995. Certiorari was granted on January 12, 1996.

Introduction and Summary of Argument

This case arises out of the implication of several of this Court's recent decisions.

> "We know from *Austin v. United States*, [], 113 S. Ct. 2801 (1993), and *United States v. Halper*, 490 U.S. 435 (1989), that forfeiture and civil fines can be penalties for crime, and from *Halper* and *Dept. of Revenue of Montana v. Kurth Ranch*, [511] U.S. ___, 114 S. Ct. 1937 (1994), that a financial exaction (in *Kurth Ranch*, a tax imposed only on persons arrested for drug offenses) can count as a separate jeopardy. *Austin* involved 21 U.S.C. § 881, the same statute invoked to forfeit [the respondent properties]."

United States v. Torres, 28 F.3d 1463, 1464 (7th Cir. 1994). The holdings and logic of this Court's unanimous decisions in *Halper* and *Austin* dictate that the forfeitures imposed in this case were, at least in part, punitive. The government's two-punch strategy "twice" placed respondents Arlt and Wren "in jeopardy" of punishment for the "same offence." More than an abstract encounter with "jeopardy," the trial court's order granting summary judgment in favor of wholesale forfeiture of all the respondents' assets resulted in their being twice punished — in separate proceedings — for the exact same offenses for which they were serving life sentences. Under long–established precedent, extending back more than 120 years[1] ,the second punishment violated the Double Jeopardy Clause of the Fifth

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[1] *Ex Parte Lange*, 85 U.S. (18 Wall.) 163 (1873). Although this Court's precedents reach back over a century, the amendment's roots issue from earliest English law, *id.* at 168-69, derived from Roman law, and ultimately are traceable to Athenian law and Democracy's antiquity. Demosthenes, *Against Leptines*, ¶ 155, http://www.perseus.tufts.edu/cgi-bin/text?lookup= dem.+20.155 ("For you are of course aware that for each grave offense a single penalty is provided by the law, which says explicitly that 'at any trial there shall be not more than one assessment of penalty, whichever the court imposes, whether a personal punishment or a fine, but not both.'").

Amendment.[2]

The preeminent principle of the Double Jeopardy Clause is a limit upon the government's power to punish: "the government, with all its resources and powers, should not be allowed to make repeated attempts to punish an individual for the same offense." *Green v. United States*, 355 U.S. 184, 187 (1957); *United States v. Dixon*, 509 U.S. 688, ___, 113 S.Ct. 2849, 2882 (1993) (Souter, J., concurring in part and dissenting in part); *Garrett v. United States*, 471 U.S. 773, 795-796 (1985) (O'Connor, J., concurring); *Ohio v. Johnson*, 467 U.S. 493, 498-499 (1984); *Burks v. United States*, 437 U.S. 1, 11 (1978). Petitioner challenges this commonsense conclusion and rewrites the entire body of relevant precedent. Failing a wholesale revision, petitioner then seeks to reconstruct the holdings of *United States v. Halper*, 490 U.S. 435 (1989), *Austin v. United States*, 113 S. Ct. 2801 (1993), and *Dept. of Revenue of Montana v. Kurth Ranch*, 114 S.Ct. 1937 (1994), giving them a crabbed and fact-bound reading. Against petitioner's measure, these cases make little historical sense and bear little significance in the development of double jeopardy jurisprudence.

Principles of *stare decisis* alone require a principled adherence to these cases, for ultimately, if these holdings were diminished, the Double Jeopardy Clause would suffer "a narrow, grudging application." *Green*, 355 U.S. at 198.

The Petitioner then warns of dire policy ramifications if the Court does not bring these cases to rein. Respondent Ursery correctly characterizes petitioner's parade of horribles as no more than red herrings on parade. Ursery Br., § A.3. Most fundamentally, "[t]he right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be

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[2] Altogether silent as to prongs and prosecutions, the Clause states: no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb."

highly valued."*Green*, 335 U.S. at 198.

A. Forfeiture Under 21 881(a)(6) Is Punishment, Even If the Property Represents, In Whole or In Part, Proceeds of Criminal Activity.

Prior to *Halper*, proceedings which could result in punishment were either denominated by Congress as "criminal" or were of a nature so plainly akin to a prosecution that the proceeding was judicially deemed pervasively penal and invested with the full complement of due process guarantees. In *Halper*, this Court recognized that punishment for Double Jeopardy purposes may also be imposed through an inherently civil proceeding. *United States v. Halper*, 490 U.S. 435 (1989). Although such proceedings may fall short of the a prosecution and thus not implicate all the protections of the Sixth Amendment, they nevertheless implicated the Double Jeopardy Clause insofar as they threatened to impose a punishment "as we have come to understand the term." *Halper*, 490 U.S. at 448. After *Halper*, a civil proceeding raises double jeopardy concerns when either

(1) in the case of a wholly remedial statute, the sanction is disproportionate to the statute's remedial goal,[3] or

(2) in the case of a statute aimed at deterrence or retribution, the sanction is not justifiable solely by reference to its remedial goals[4],

so that the sanction may be said to be punishment. The denomination "civil" or "criminal" is not of paramount importance: the nature of the statute and its sanction control whether double jeopardy protection applies to successive proceedings.

Austin relied upon this Court's earlier determination in *Halper* that a penalty which Congress intended to be punitive, or

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[3] The so-called "rare case." Pet. Br. at 11; *Halper*, 435 U.S. at 449.

[4] A categorical test, not requiring the case-by-case analysis necessary to analyse the remedial-type sanctions.

which could not be justified for solely non-punitive purposes, is punishment under the Double Jeopary Clause. The historical understanding of forfeitures such as those in 21 U.S.C. § 881(a)(4) and (a)(7) confirmed that the statutes imposed punishment: they focused on the owner's culpability by authorizing the forfeiture only if the owner was tied directly tothe commission of a crime; and Congress intended that they serve the dual goals of punishment: retribution and deterrence.

There is nothing which differentiates property the government seeks to define as proceeds under 21 U.S.C. § 881(a)(6) from any other type of property subject to forfeiture, including conveyances, homes, instrumentalities, and all other porperty described in 21 U.S.C. § 881(a)(4), (a)(6), or (a)(7).

Every circuit that has considered the issue has correctly concluded that *Austin*, in applying the principles first enunciated in *Halper*, determined that civil *in rem* orfeitures were meant, at least in part, to punish and that such punishment implicated the Double Punishment Clause of the Fifth Amendment as well as the Excessive Fines Clause of the Eighth Amendment.

B. The proceedings were separate.

The criminal and civil proceedings against respondents were as separate as they could be. The petitioner argues that a proceeding is impermissibly successive only if it occurs after the defendant/claimant's expectation of finality has ripened in the prior proceeding. Pet. Br. 55-56. This argument fails to acknowledge the literal protection afforded by the Double Jeopardy Clause. The plain language of the Clause limits the government's ability to seek punishments through multiple or successive proceedings.

"Expectation of finality," the government's linchpin, applies only to those instances where the government has sought to revisit a particular punishment after a singular verdict.[5] Finality,

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[5] "Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by

notwithstanding the government's elaborate recasting of this Court's recent decisions, does not play any role in determining whether a civil *in rem* forfeiture is itself separate from the criminal sentence, so that the defendant can be seen as "twice" facing risk of punishment. As set forth in Part A, *post*, the determinative characteristic of 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) is punishment: both statutes impose punishment entirely separate from their corollary criminal offenses; both require new verdicts, not merely additional fact-finding; and neither is imposed as part of the original judgment of sentence. Timing, finality, and the order of proceedings do not alter this fundamental characteristic.

To be sentenced and then to have one's property forfeited is to be punished twice within the meaning of the Double Jeopardy Clause.

C. Respondents' forfeitures were for the "same offense" as respondent's prior convictions.

Forfeitures under 21 U.S.C. § 881 and 18 U.S.C. § 981 are punishments "as we have come to understand the term," not "offenses". *Austin v. United States*, 113 S.Ct. at 2812 (1993) quoting *Halper*, 490 U.S. at 448; and see *Libretti v. United States*, 516 U.S. ___, 116 S.Ct. 356,363 (1995) ("heightened procedural protections to imposition of criminal forfeiture as punishment . . . cannot alter the simple fact that forfeiture is precisely that: punishment"). The factual predicates of forfeiture are not the functional equivalent of the "elements of an offense"[6]; forfeiture is merely the imposition of a punishment and does not stand as an offense unto itself.

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the Constitution." *Ex parte Lange*, 85 U.S. at 173 (1873).

[6] The need for fact-finding at the punishment phase is well established: mail fraud prosecutions do not require a finding of victim loss, *United States v. Copple*, 24 F.3d 535, 544 (3d Cir. 1993) (Becker, J.), whereas the fact of victim loss must be proven before the sentencing court may impose restitution as a component of the sentence. Thus, predicates to punishment are not co-equal to the (predicate) elements of conviction, any more than *in rem* forfeitures are co-equal to their corollary offenses.

As a consequence, this Court has never applied the *Blockburger* "same elements" test to civil penalties, but has consistently examined whether the offense underpinning the civil penalty was the same as gave rise to the prosecution. See *Blockburger v. United States*, 284 U.S. 299 (1932); *United States v. Halper*, 490 U.S. 435 (1989); *Dept. of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937 (1994). A *Blockburger* side-by-side elements comparison would be immaterial; the question is merely whether the forfeitures were sought for the same offense as the prosecution.

Respondents meet this test. The central justification for the government's forfeitures was predicated on respondents' commission of the offenses for which they were already serving life in prison. The forfeiture proceedings brought against respondents constituted punishment for the same offense because the government had incorporated the corollary criminal offenses into its summary judgment motion. Resp. Arlt's Br. in Opp.1a-29a.

Even if forfeiture is an offense in its own right, as the government argues, the *Blockburger* test would be met in this case. The forfeiture statutes wholly subsume the substantive criminal offenses set forth in Title 21 and the money laundering statutes; what is more, the government's forfeiture claims against Arlt's and Wren's property wholly subsume the respondents' previous criminal convictions. Under either *Libretti* or *Blockburger*, the government's campaign to forfeit respondents' property was an attempt to inflict a second punishment for the same offenses for which respondents were previously prosecuted.

ARGUMENT

THE *IN REM* FORFEITURE OF RESPONDENTS' PROPERTY PUNISHED THEM A SECOND TIME FOR THE SAME OFFENSE IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE

A. The *In Rem* Forfeiture of Property Including Drug Proceeds Pursuant to 21 U.S.C § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) Constitutes Punishment Under the Double Jeopardy Clause.

In its successful motion for summary judgment in the *in rem* forfeiture proceeding, the government advanced several theories. Principally, the government contended that the named property represented proceeds under 21 U.S.C. § 881(a)(6). The district court granted summary judgment, albeit for a number of reasons having little to do with proceeds *simpliciter*. (See Section 3, *post*); Pet. App. 75a-77a. For the following reasons the court of appeals correctly held that, even assuming the property was properly found to be proceeds, its forfeiture constituted a prohibited second punishment of the respondents for the same methamphetamine and money laundering offenses for which they were already serving life sentences.

1. The holdings in *Halper* and *Austin* were harmonious and demonstrate that the forfeitures in this case were punishment.

The forfeitures against respondents Wren and Arlt constituted punishment for the same reasons that led this court to hold that civil penalties and administrative taxes could be punishment. The forfeitures here cannot be distinguished, for the purposes of Double Jeopardy analysis, from the punitive effects of the sanctions imposed in *Halper* and *Austin*.

Halper teaches the following: when Congress intends that a civil statutory scheme be solely remedial and damages in fact bear a rational relationship to the government's actual loss, then the Government is entitled to "rough remedial justice or compensation" such as "reasonable liquidated damages." The result does not offend double jeopardy because it does not

amount to "punishment." *Halper*, 409 U.S. at 446.

On the other hand, a civil remedy which "authoriz[es] a supposedly remedial sanction" — but which do not roughly approximate the government's damages and costs — are punishment and may offend double jeopardy. *Halper*, 490 U.S. at 446.

Within the contours of that broad analytical framework, *Halper* stands for the proposition that a statutory penalty which Congress intended to be punitive, or which cannot be justified for solely non-punitive purposes, is punishment for double jeopardy purposes.

> Simply put, a civil as well as criminal sanction constitutes punishment when the sanction as applied in individual cases serves the goal of punishment.
>
> These goals are familiar. We have recognized in another context that punishment serves the twin aims of retribution and deterrence. See *e.g.*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963)(these are the 'traditional aims of punishment'). Furthermore, '[r]etribution and deterrence are not legitimate nonpunitive governmental objectives.' *Bell v. Wolfish*, 441 U.S. 520, 539 n. 20 (1979). From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

Halper, 490 U.S. at 448.

Subsequently, in *Austin v. United States*, this Court utilized the *Halper* Double Jeopardy test to examine an Excessive Fines challenge and applied the test to civil forfeiture proceedings under 21 U.S.C. § 881(a)(4) and (a)(7). *Austin*, 113 S.Ct. at 2806. The Court held that the value of property forfeitable under those sections varies so "dramatically that any relationship between the government's actual costs and the amount of the

sanction is merely coincidental." *Id.* at 2812 n. 14. See also *Kurth Ranch*, 114 S.Ct. 1937 (1994) (focusing on the goals of the tax statute as a whole). Thus, *Austin* obviated the necessity of an accounting of the government's damages. Instead it relied on a three-prong approach to determine that civil *in rem* forfeitures categorically constitute punishment.

In *Austin*, this Court unanimously concluded that forfeitures under 21 U.S.C. § 881(a)(4) and (a)(7) are properly considered punishment for three reasons. First, nothing in those sections contradicts the historical understanding of forfeiture as imposing punishment. Second, those civil *in rem* forfeiture statutes focus on the owner's culpability by providing for a "innocent owner defense" and by tying forfeitures directly to the commission of a drug offense. Third, Congress understood those civil *in rem* forfeitures to serve the dual punitive goal of deterrence and punishment. *Austin*, 113 S.Ct. at 2810-11.

As a result of this Court's determination in *Austin*, there is no need for a further *Halper* inquiry regarding whether civil *in rem* forfeitures under 21 U.S.C. § 881(a)(4) and (a)(7) constitute punishment. To suggest otherwise simply argues, without the courage to say so, that the Court's opinion in *Austin* was wrong.

The government raises numerous concerns regarding this court's prior holdings in *Halper* and *Austin*, none of which find support in the language of the opinions or in the principles espoused in those cases.[7] The government boldly suggests that

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[7]For example, petitioner and one *amicus* argue that *Halper* would be better understood as an Excessive Fines case. Br. for Amicus 39 Counties. The notion springs from *Halper's* use of proportionality, which petitioner and amicus treat, without differentiation, as the equivalent of the Excessive Fine test. In *Halper*, proportionality refers to whether an otherwise remedial sanction serves rough justice, that is, whether a sanction's disproportionality rises to a level where it can be said to punish. The fact that a sanction is punishment, however, is distinct from whether it *necessarily* exceeds the Excessive Fines Clause. Pet. 15a, n. 8 and text. Similarly, *Kurth Ranch* shows that a second

there exists some tension between the "categorical" language in *Austin*, and the "case-by-case" approach adopted in *Halper*,; Pet. Br. 41. No such tension exists between these unanimous decisions.

The government's request that this Court disregard the *Austin* analysis to the Double Jeopardy Clause — and its suggestion, Pet. Br. 41, that such an application would defeat the *Halper* case-by-case approach — makes no sense. There is no contradiction between these two approaches. *Halper* mandates that all civil sanctions be examined to determine whether they serve retributive or deterrent purposes. *Halper*, 490 U.S. at 448. If that civil sanction does serve a retributive or deterrent purpose, as opposed to solely serving a remedial purpose, it is punishment for purposes of the double jeopardy clause. *Id. Austin* followed exactly what this Court previously mandated in *Halper*. Indeed, the *Austin* decision was based specifically on that prior holding.

> We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained as serving in part to punish. We said in *Halper* that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. 490 U.S. at 448, 109 S.Ct. at 1902.

Austin, 113 S.Ct. at 2806.

Therefore, *Austin* forecloses any further inquiry regarding civil *in rem* forfeitures under 21 U.S.C. § 881(a)(4) and (a)(7) in determining whether or not those sections constitute punishment. They do; what is more, the government has advanced no credible argument to support a wholesale rejection and overruling of this Court's recent unanimous holdings.

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punishment that is not excessive can nevertheless offend double jeopardy. *Kurth Ranch*, 114 S.Ct. at 1946-47 (tax rate's size did not render tax punitive).

The government's brief expresses fear that the extension of *Austin's* formulation to other contexts could cast unwarranted doubt on the constitutionality of practices that have long been thought entirely proper. Pet. Br. 41. The concern is illusory. *Austin* focused on one statutory scheme, civil *in rem* forfeitures pursuant to 21 U.S.C. § 881. That its rationale may extend to other contexts is no reason to deny its compelling analysis. Even so, the government's fears are unfounded. Numerous civil sanctions have been determined to serve solely remedial goals. This Court has upheld fines and penalties based on the intent of Congress to formulate a remedial statute. Congress intended that these civil actions be solely remedial: *Helvering v. Mitchell*, 303 U.S. 391(1938), (tax deficiency and penalty based on tax loss and investigatory costs); *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (*qui tam* recovery under 31 U.S.C. 3730(b) where the actual cost to the government roughly equaled the damages recovered); see *Halper*, 490 U.S. at 444, 445–46; *Rex Trailer Company v. United States*, 350 U.S. 148 (1956) (recovery of a specific related loss as to five surplus vehicles); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972) (liquidated damage provisions of customs forfeiture statutes were intended to be solely remedial); and *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984) (illegal firearms).[8]

There is nothing inconsistent between this Court's prior decisions and its determinations in *Halper* and *Austin*. See *Austin*, 113 S.Ct. at 2804 n. 4. Therefore, the government's concern that the application of *Austin* to double jeopardy would cast unwarranted doubt on the constitutionality of practices that

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[8] *Amici*, too, sound the alarm but no more convincingly than the government. The prevalent practice of summarily suspending the licenses of drivers susptected of operating a motor vehicle while under the influence has been held to be sufficiently remedial so as to not implicate punishment nor double jeopardy concerns. Br. of MADD at 12-14. The use of equitable abatement, likewise, does not implicate punishment. *Bennis*, ___U.S. ___, 1996 WL 88269, No. 94-8729 (March 4, 1996) (Ginsburg, J.).

have long been thought proper is ill-founded. Before any civil fine or penalty can be held to be punitive to the extent that it implicates the Double Jeopardy Clause of the Fifth Amendment or constitutes punishment in any constitutional respect, it must continue to be examined in light of both *Halper* and *Austin*. *Austin* has simply foreclosed that inquiry as to civil *in rem* forfeitures pursuant to § 881(a)(4) and (a)(7), and rightly so.

The government also suggests that "[t]he extension of *Austin's* reasoning...to the double jeopardy setting "would lead to increased litigation about matters unrelated to the basic concerns of the relevant constitutional provision, and likely would ultimately prove unworkable." Pet. Br. 41.

This parade of horribles reflects a disingenuous disregard of the tremendous power the Government continues to wield under the criminal forfeiture statutes to obtain the same results it improperly sought in these civil proceedings. The anarchy suggested by the Government is pure puffery. Not only does the Government have the option of seeking both criminal prosecution and forfeiture in the same proceeding pursuant to 21 U.S.C. § 853(a)(2) and 18 U.S.C. § 982, but the Government may proceed with civil *in rem* forfeiture actions in the absence of a related criminal prosecution.[9] As a matter of fact, that may be the preferred process.

> Where the issues related to civil forfeiture are the same as or closely related to those that will arise in the prosecution of a drug offense, it is a waste of valuable judicial and prosecutive resources to require separate civil forfeiture proceedings . . . thus, a more efficient

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[9] The Government raises an interesting but false concern, that the "nuisance" of a crack–infested tenement could not be abated without having the civil forfeiture confer upon its fugitive owner a form of immunity. Pet. Br. 57 n.17. Forfeiting a nuisance is a remedial act whose sanction (unlike *Halper's* or Respondents) could, under the proper statutory language, be entirely justified by its remedial goals. In any event, this Court has rejected the notion that an equitable abatement of a nuisance would be deemed a punishment, *Bennis*, ___ U.S. ___, 1996 WL at 88269.

> mechanism for achieving the forfeiture of a defendant's proceeds from his drug trafficking or of other property he has used in the offense is to permit the criminal forfeiture of such property and thereby consolidate the forfeiture action with the criminal prosecution. [21 U.S.C. § 853] creates such a mechanism. S. Rep. No. 225, 98 Cong., 2d Sess. 210, reprinted in 1984 U.S. Code Cong. Admin. News 3182, 3393.

United States v. Littlefield, 821 F.2d 1365, 1367–68 (9th Cir. 1987). Thus, there is no bar to the government proceeding by way of criminal forfeiture which serves as the efficient alternative to civil forfeiture just as Congress intended. See also *United States v. Smith*, 966 F.2d 1045 (6th Cir. 1992).[10]

The government routinely includes forfeiture counts in its criminal indictments, see *Libretti*; *Alexander v. United States*, 509 U.S. 544 (1993), and, as the government itself points out, Pet. Br. 54, there is no double jeopardy bar to seeking multiple punishments in a single proceeding. See *e.g.*, *Missouri v. Hunter*, 459 U.S. 359, 368–69 (1983).[11]

3. *Halper* and *Austin* apply to proceeds.

The government contends that, even if civil forfeiture under other portions of 21 U.S.C. § 881(a) constitutes punishment, at least in part, a special dispensation from the scope of the Double Jeopardy Clause should be granted. This grant should benefit not all property forfeitable under § 881(a)(6), but only a single

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[10] Although the Government only addresses 18 U.S.C. § 981 issues in its *Blockburger* argument, Pet. Br. 51, and appears to have otherwise abandoned argument with respect to this statute, there are criminal forfeiture provisions under the Money Laundering Statute, 18 U.S.C. § 982, analogous to criminal forfeitures under 21 U.S.C. § 853, that incorporate the same procedures provided for in 21 U.S.C. § 853. See *United States v. Ripinsky*, 20 F.3d 359 (9th Cir. 1994).

[11] As *amicus* suggests, criminal forfeitures are not only more fair than their civil counterparts, they are also more efficient than bringing separate civil proceedings. Br. NACDL 22.

type of property described in one phrase in § 881(a)(6) as "all proceeds traceable" to an exchange for a controlled substance. 21 U.S.C. § 881(a)(6). Although the government devotes only three pages of its brief to this contention, Pet. Br. 48-50, this is a refrain which has become popular among courts seeking to avoid the application of *Halper* and *Austin* to the government's increasing use of dual criminal and civil forfeiture proceedings. See *United States v. Tilley*, 18 F.3d 295 (5th Cir.), cert. denied, 115 S.Ct. 573 (1994); *United States v. Salinas*, 65 F.3d 551 (6th Cir. 1995) (following *Tilley*); *United States v. Smith*, 76 F.3d 879 (7th Cir. 1996) (same). It is important, therefore, to give careful attention to what this purported exception to double jeopardy protection entails and to determine if it is justified.

Some courts, including those noted above, have been reluctant to enforce double jeopardy protections when faced with strong proof, or even outright admissions, of illegal drug activity. After all, we all live in the midst of a national "War on Drugs."

> We are not unsympathetic to the government's strong desire to eradicate drug trafficking: * * * We must not forget, however, that at the core of this system lies the Constitution, with its guarantees of individuals' rights. We cannot permit these rights to become fatalities of the government's war on drugs

United States v. $38,000 in United States Currency, 816 F.2d 1538, 1548-49 (11th Cir. 1987). Once the Fifth Circuit erroneously declared in *Tilley* that the forfeiture of drug proceeds "will always be directly proportional to the amount of drugs sold," *Tilley*, 18 F.3d at 300, and therefore, arguably purely remedial, the temptation was great to disallow double jeopardy claims on this basis. The government has been quick to assert "proceeds" as a talisman in place of analysis to avoid double jeopardy's bar to further punishment. Thus, in one case, a court has applied the "proceeds" shield to a double jeopardy claim, based on no more than the appearance in the government's pleadings of a "proceeds" theory of forfeiture, wholly unsupported by any evidence. See *Salinas*, 65 F.3d at

553-54 & n. 1.[12]

Yet, as this court has observed, the notion of punishment cuts across the application of simple labels, and courts "must follow the notion where it leads." *Halper*, 490 U.S. at 448. And the prohibition of second punishments is "within the contemplation of a constitutional protection that has 'deep roots in our history and jurisprudence.'" *Kurth Ranch*, 114 S.Ct. at 1948, (quoting *Halper*, 490 U.S. at 440). Those who drafted and adopted the Fifth Amendment certainly understood that its application would benefit those who had engaged in criminal conduct and had been convicted of serious offenses.

Since the decision in *Halper*, the government has continued to vigorously pursue dual criminal and civil forfeiture actions, ignoring that neutral, common sense analysis would find punitive aspects in all forfeitures under 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A). In the face of direct warnings from the courts and legal writers, the government sought refuge behind legal fictions and superficial labels. See *e.g.*, *United States v. Michelle's Lounge*, 39 F.3d 684, 696 (7th Cir. 1994) ("The use of parallel proceedings (cites ommitted) a civil forfeiture to restrain assets and obtain discovery, followed by a criminal indictment that stays the civil case [cite omitted] sometimes sets these two regimes

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[12] The *Salinas* court stated: "The forfeiture proceeding was based on the *theory* that the car was proceeds because it was purchased with drug money, Salinas' only source of income. Since Salinas failed to contest the proceeding in any way, he is estopped from now challenging the theory under which the vehicle was forfeited." *Salinas,* 65 F.3d at 553, n. 1 (emphasis added). No authority was given for such a novel application of estoppel. In his concurrence, Judge Wellford forthrightly admitted: "*Tilley* presents several problems in application. * * * [I]f the government had sought forfeiture of Salinas' automobile on the grounds that he used the car to carry narcotics from Texas to Michigan, [the Sixth Circuit's prior decision in] *Ursery* [59 F.3d 558 (1995)] might have barred this criminal prosecution. Thus, after *Ursery* and our decision today, double jeopardy protection will often depend on which theory the government utilizes to justify the civil forfeiture." *Id.* at 554.

on a collision course"); T. Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. Miami L. Rev. 911 (1991) (legal fiction that forfeiture is an action against a "guilty" *res*, not the property owner, obscures the punitive aspects of forfeiture). Now the government attempts to use the new label of "proceeds" to avoid constitutional prohibitions. Yet even the most strict view of double jeopardy protections acknowledges that the forfeiture of currency (or other non contraband) is a "taking of lawful property" which "must be considered, in whole or in part, punitive." *Austin*, 113 S.Ct. at 2813 (Scalia, J., concurring in part and in the judgment).

As the following analysis shows, no sound basis exists for applying the Double Jeopardy Clause differently to alleged proceeds than other types of forfeitable property.

The statutory scheme treats "proceeds" in exactly the same manner as other types of property subject to forfeiture. Thus, a conveyance used to facilitate drug transportation, § 881(a)(4); real property used to facilitate drug transactions, § 881(a)(7); money furnished in payment for drugs; § 881(a)(6), money intended to be used to facilitate drug activity, § 881(a)(6); and proceeds traceable to a drug exchange, § 881(a)(6); all are subject to § 881(a) as property that "shall be subject to forfeiture to the United States and no property right shall exist in them." 21 U.S.C. § 881(a)[13].

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[13] 21 U.S.C. § 881(a)(6) provides:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

* * *

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to

As the lower court made clear, 21 U.S.C. § 881(a)(6) encompasses more than profits or proceeds. "Rather than rendering only the *profits* of drug dealers subject to forfeiture, the statute applies to nearly any money that is involved in a narcotics transaction in some fashion." Pet. App. 20a-21a.

The analysis in *Austin* which concluded that § 881(a)(4) and (a)(7) were at least in part punitive in nature applies with equal force to § 881(a)(6) categories of property. § 881(a)(6) contains an "innocent owner" defense which is identical to that contained in § 881(a)(7). Thus, both provisions focus "on the culpability of the owner in a way that makes them look more like punishment, not loss." *Austin*, 113 S.Ct. at 2811.[14] All three subsections "tie forfeiture directly to the commission of drug offenses." *Id.* And the legislative history of § 881 related in *Austin, id.*, confirms that the types of property described in 881(a)(6), including proceeds, were just as surely a product of congressional intent to advance the punishment and deterrence of the drug trade as was subsection (a)(7). See *United States v. 9844 South Titan Court*, 75 F.3d 1470 (10th Cir. 1996) (noting that the government "suggests no reason to treat [§ 881(a)(6)]

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have been committed or omitted without the knowledge or consent of that owner.

The statute makes no distinction among these types of property. See *Kurth Ranch*, 114 S.Ct. at 1946 ("forfeitures are readily characterized as sanctions").

[14] In *Bennis v. Michigan*, ___ U.S. ___, 1996 WL 88269 (March 4, 1996), this Court revisited the *Austin* analysis of the significance of the statutory "innocent owner" defense.

> In *Austin*, the Court held that because "forfeiture serves, at least in part, to punish the owner," forfeiture proceedings are subject to the limitations of the Eighth Amendment's prohibition against excessive fines. 509 U.S. at __, 113 S.Ct. at 2810. There was no occasion in that case to deal with the validity of the "innocent-owner defense," other than to point out that if a forfeiture statute allows such a defense, the defense is additional evidence that the statute itself is "punitive" in motive. *Id.*, [ ] 113 S.Ct. at 2809-2810.

___ U.S. ___, 1996 WL 88269, at *6 (emphasis added).

differently in terms of its intent, effect, or legislative history").

The government notes that the forfeiture of proceeds is "a recent development in forfeiture law." Pet. Br. 48. Its recent inclusion in the language of § 881(a), however, has no bearing on whether it is intended to be punitive. Indeed, this Court observed in *92 Buena Vista Avenue* that the 1978 amendment authorizing the forfeiture of drug proceeds marked "an important expansion of government power." *United States v. 92 Buena Vista Avenue* , 507 U.S. 111, 121 (1993). As *Austin* noted, the punitive purpose which prompted congressional action in 1978 had not waned with the amendments of 1984. *Austin*, 113 S.Ct. at 2811 (citing Joint House-Senate Explanation of Senate Amendment to Titles II and III of the Psychotropic Substances Act of 1978, 124 Cong. Rec. 34671 (1978) (noting "the penal nature of forfeiture statutes")).[15]

For example, *Austin's* historical determination was not affected by the fact that prior customs laws, piracy laws, and revenue laws themselves contained no innocent owner defense. Indeed, like the proceeds provisions, that defense is a recent statutory creation that supports the conclusion that the statutes are punitive. *92 Buena Vista Avenue*, 507 U.S. at 122-123. Thus, despite their recent vintage, this Court found that forfeitures under § 881(a)(4) and (a)(7) were punishment, even though "[u]nlike traditional forfeiture statutes, § 881(a)(4) and (a)(7) expressly provide for an 'innocent owner' defense." *Austin*, 113 S.Ct. at 2810; see also *Bennis*, ___ U.S. ___, 1996 WL 88269, at *6. Significantly, it is the very fact that the forfeiture statutes in this case do not have a traditional remedial

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[15] Congress clearly had punishment in mind when, in 1978, it added subsection (a)(6) to § 881. The legislative gloss noted that "due to the penal nature of forfeiture stautes," property should only be forfeited if there is a "substantial connection between the property and the underlying criminal activity." 124 Cong. Rec. 34,661 (1978). Congress intended forfeitures pursuant to § 881(a)(6) to constitute punishment, and under the *Austin* three-part analysis, there exists no reason whatsoever to distinguish § 881(a)(6) from (a)(4) and (a)(7).

pedigree, but have origins in congressional action seeking to enhance drug penalties, that their punitive purpose is revealed. No remedial objectives are mentioned anywhere in the legislative history of the Comprehensive Drug Abuse and Prevention Control Act of 1970, nor in the amendments to that act which are at issue here. Largely because of the contemporary genesis of these forfeiture provisions, there is no question that forfeitures under 21 U.S.C. § 881(a)(6) and under 18 U.S.C. § 981(a)(1)(A) are properly considered punishment.

3. Forfeiture under 18 U.S.C. § 981 also involves punishment.

The government's motion for summary judgment was also based on an application of 18 U.S.C. § 981(a)(1)(A) which provides for forfeiture of property involved in various currency and money laundering violations.[16]

In this Court, the government has offered no analysis and has apparently abandoned all argument with respect to § 981.[17] The government's abandonment is proper. As applied to the double jeopardy analysis of civil punishment, however, the statute functions virtually identically with the analogous § 881 forfeiture statute.

The term "proceeds" does not appear anywhere in § 981(a)(1)(A). The sweep of § 981 is extremely broad, including any property "involved in" an illegal money laundering

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16 18 U.S.C. § 981(a)(1) provides in part:

(a)(1) Except as provided in paragraph (2), the following property is subject to forfeiture in the United States:

(A) Any property, involved in a transaction in violation of section 5313(a) or 5324 of title 31, or of section 1956 or 1957 of this title, or any property traceable to such property. However, no property shall be seized or forfeited in the case of a violation of section 5313(a) of title 31 by a domestic financial institution regulated by the Securities and Exchange Commission or a partner, director, or employee thereof.

17 Except as to the "same offense" test under the government's *Blockburger* theory, see part C, *post*.

transaction. Indeed, the government argued to the Ninth Circuit against any limitation of § 981(a)(1)(A) to proceeds. Pet. App. 21a. Such a limitation, the government argued, would undermine the purpose of the forfeiture statutes because money laundering largely depends upon the use of legitimate monies to advance or facilitate a money laundering scheme and the government sought these monies as well as ill-gotten proceeds. The government's position has historically been that forfeitures under § 981(a)(1)(A) are expressly not limited to proceeds. Pet. App. 21a and n. 12, Government's Memorandum of Contentions of Fact and Law.

4. This case does not involve only proceeds and cannot be decided solely upon an analysis of proceeds forfeiture.

Although the government's brief argues that the property in $405,089 represents proceeds, the government cannot fairly "claim that this case involved *only* the forfeiture of illegal proceeds." Pet. App. 21a (emphasis in original). Indeed, the government implicitly concedes this in its brief: "The district court in [this] case granted summary judgment...on the ground, *among others*, that the assets at issue were 'proceeds' of narcotics trafficking." Pet. Br. 48 (emphasis added). The district court granted summary judgment in favor of the government in a terse one sentence order encompassing all of the defendant properties and accepting all of the government's arguments. Pet. App. 76a and 77a. That court's order was not based on a proceeds theory. The government's summary judgment motion, in fact, sought forfeiture for significant non-proceeds reasons, including that there were "financial transactions designed to conceal the location, source, or the ownership of defendant properties," Pet. App. 68a, there was property "used to 'facilitate' illegal money laundering" pursuant to 18 U.S.C. § 981(a)(1), Pet. App. 70a–71a, and that legitimately obtained funds, to the extent they were commingled with forfeitable funds, were forfeitable. Pet. App. 71a.

In opposition, respondents Arlt and Wren vigorously

disputed the government's alleged "uncontroverted" facts, showing that for every cash transaction requiring it, they had filed a proper Currency Transaction Report (CTR) and IRS 1099 forms, Resp. Arlt's Br. in Opp. 43a, that all cash transactions were legal in themselves, and that all of respondents' properties had been acquired in a legal manner with lawful funds. Resp. Arlt's Br. in Opp. 31a–52a. The district court's ruling did not discuss why it rejected these arguments, but it is clear from the foregoing that the order was not based solely on a "proceeds" theory.

5. Proceeds are not "contraband" and their forfeiture is not solely remedial.

United States v. Tilley and those cases following it adopt the view that the forfeiture of drug "proceeds" is, by definition, purely remedial, and therefore outside the scope of the Double Jeopardy Clause. *Tilley*, 18 F.3d at 298-99. Close analysis reveals, however, that Tilley and its progeny are based upon seriously flawed reasoning and are unfaithful to the principles of *Halper* and *Austin*.[18]

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[18] Not only does *Tilley* contradict it's own prior decision in *Wood v. United States*, 863 F.2d 417, 421 (5th Cir. 1981) (holding that § 881(a)(6) forfeitures cannot seriously be considered anything other than punishment), but the same Fifth Circuit later conceeded that the *Austin* court specifically eliminated the necessity of the *Halper* case-by-case approach in the forfeiture setting and that the logic of *Austin* applies to the Double Jeopardy Clause. *United States v. Perez*, 70 F.3d 345, 349 (5th Cir. 1995). Thus, the Fifth Circuit stands in the anomalous position of conceeding the *Austin* categorical approach that § 881(a)(4) and § 881(a)(7) civil forfeitures constitute punishment not only for Eighth Amendment purposes, but also for Fifth Amendment Double Jeopardy purposes, yet holding that § 881(a)(6) forfeitures are "distinctly different". *Id.* 349. And, of course, given the broad language of § 881(a)(6), what the Fifth Circuit must really have meant is that *most* § 881(a)(6) forfeitures constitute punishment for double jeopardy pusposes, but only those which are proven to be the type of forfeitures described by one word in the statute — proceeds — are not afforded the same double jeopardy protection. There is no principled way to support such an argument.

Tilley first asserted that the forfeiture of proceeds was solely remedial because it was repayment for the social cost of the illegal activity and the cost of investigating and prosecuting the criminal conduct. *Id.* The underpinnings of this proposition are built upon shifting sand. If forfeiture is meant to repay all of society's costs of drug abuse, it necessarily follows that the individual property owner is required to pay for the acts of third parties for which he is not directly responsible, much less able to control. That suddenly sounds very much like punishment; and it also fits very neatly within the definition of constituting "payment to a sovereign as punishment for some offense," i.e. a penalty, not something purely remedial. *Browning-Ferris Industries v. Kelso Disposal, Inc.*, 492 U.S. 257, 265 (1989). The government did not attempt to show in the court below, nor does it now claim, that the forfeiture in this case "approximates the cost of investigating, apprehending, and prosecuting" the respondents, or "that it roughly relates to any actual damages that they caused" the government. *Kurth Ranch*, 114 S.Ct. at 1948. This Court, in dealing with *in rem* civil forfeitures, has already rejected the "repayment to society" rationalization, holding that the value of the properly forfeited under those sections varies so dramatically that any relationship between the government's actual costs and the amount of the sanction is merely coincidental. *Austin*, 113 S.Ct. at 2812, n. 14.

Additionally, as the Tenth Circuit noted in rejecting *Tilley's* analysis:

> The difficulty with the "repayment to society" argument is that it applies as readily to all § 881 forfeitures as it does to the forfeiture of drug proceeds. If the "remedy" effected by forfeiture is understood broadly enough to encompass not only direct governmental losses, ... but also the nearly incalculable "social costs" of an entire class of legal conduct, then all forfeitures are purely remedial. This conclusion is inconsistent with the Supreme Court's analysis in *Austin*.

Titan Court, 75 F.3d 1470, 1485 (1996).

Tilley's second claim is that "the forfeiting party loses

nothing to which the law ever entitled him." *Tilley*, 18 F.3d at 300. It is suggested that forfeiting drug proceeds is analogous to seizing stolen money from a bank robber "who is arrested as he exits the bank." Pet. Br. 48. See *United States v. Smith*, 76 F.3d 879, (7th Cir. 1996); citing *Tilley*, 18 F.3d at 300.

The problem with the bank robbery analogy is that restitution to the bank, the lawful owner of the stolen money, is totally different from requiring payment (i.e., forfeiture) "to a sovereign ... for some offense." *Browning-Ferris Industries*, 492 U.S. at 265. The bank robber has no right to possess or pass good title to money stolen from a bank. Restatement 2nd of Torts, § 871 (1977). The Fifth Circuit asserted in *Tilley* that "the forfeiting party loses nothing to which the law ever entitled him." *Tilley*, 18 F.3d at 300. Yet, as the Tenth Circuit observed in *Titan Court*:

> *Tilley* does not state, and we do not find, any class authority for the proposition that legal ownership of drug proceeds is impossible. In fact, drug proceeds are ownable by anyone who can establish an innocent owner defense. *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 128, 113 S.Ct. 1126, 1137,122 L. Ed. 2d 469 (1993). Thus, even a noninnocent possessor of such proceeds must own them insofar as he can alienate them. We must conclude that the proposition that drug proceeds may not be owned is false as a statement of law.

Titan Court, 75 F.3d at 1485-86.

The government's attempt to also characterize forfeitures under 21 U.S.C. § 881(a)(6) as contraband is a rehash of the same argument rejected by this Court in *Austin*.

> Concededly, we have recognized that the forfeiture of contraband itself may be characterized as remedial because it removes dangerous or illegal items from society. See *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364, 104 S.Ct. 1099, 1105

> (1984). The Court however, previously has rejected the government's attempt to extend that reasoning to conveyances used to transport illegal liquor. The same, without question, is true of the properties involved here.

113 S.Ct. at 2811. Contraband cannot be created by judicial fiat, but only by legislative action. See *Trupiano v. United States*, 334 U.S. 699 (1948). This Court has consistently rejected the characterization of conveyances or instrumentalities as contraband. See *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965) ("there is nothing even remotely criminal in possessing an automobile"); see also *Austin*, 113 S.Ct. at 2811 (citing *One 1958 Plymouth Sedan).*

Although the forfeiture of clearly-defined contraband is remedial because it removes dangerous or illegal items from society, the same is not true as to property described in 21 U.S.C. § 881(a)(6) or 18 U.S.C. § 981(a)(1)(A). None of those properties are dangerous in-and-of-themselves nor illegal in-and-of-themselves. Characterizing them as contraband or "the functional equivalents of contraband", Pet. Br. 50, expands that concept far beyond its historical meaning. Money, or other property, which represents proceeds of some criminal activity or which represents the investments of alleged proceeds does not become contraband simply because of its origin. To adopt such a rule would be devastating, a concern recently expressed by Justice Stevens in his dissent in *Bennis v. Michigan*, ___ U.S. ___, 1996 W.L. 88269 *14, n.1.

From that perspective, it is clear that 21. U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) property is not contraband, since the statue gives the legal right to anyone to own such property subject to forfeiture, including proceeds. This right of ownership is *substantial*, allowing a possessor or owner of forfeitable property to alienate their interests to either a *bona fide* purchaser or a donee. *92 Buena Vista Avenue,* 113 S.Ct. at 1137. This property right to forfeitable property is greater than the right of one who might obtain property through fraud, where

such a person has a voidable title but can pass good title only to a bona fide purchaser for value. Restatement (2nd) of Contracts § 163 (1979); *Langley v. FDIC*, 484 U.S. 86, 93-94 (1987). Thus the argument that a possessor or owner of drug proceeds has no property right in such "contraband" is false as a matter of law.

Consider, for example, a person taking a $10,000 bank loan in order, surreptitiously, to finance the purchase of cocaine on the wholesale market. The intention is to sell the drugs at retail, anticipating $15,000 in gross receipts. This initial $10,000 is not contraband, though it is subject to forfeiture under § 881(a)(6). It is equally in error to contend that title to the currency vested in the government upon the intention to use the loan or even upon the commission of the drug transaction itself. Despite the language in § 881(a) that "no property right shall exist" in the types of property described in (a)(1) through (a)(7), the government must first obtain the forfeiture before all rights are extinguished. The government advanced its relation back "no property right" argument in *92 Buena Vista Avenue*, where this Court rejected it out of hand.

> [The government] contends that [respondent] never had been the owner of this parcel of land because the statute vested ownership in the United States at the moment when the *proceeds* of an illegal drug transaction were used to pay the purchase price. In support of its position, the Government relies on both the text of the 1984 amendment to the statute, and the common law relation back doctrine. We conclude, however, that neither the amendment nor the common law rule make the Government an owner of property *before* forfeiture has been decreed.

92 Buena Vista Avenue, 507 U.S. at 123-124 (emphasis added). As *92 Buena Vista* made clear: "Until the Government does win such a judgment [of forfeiture], ... someone else owns the property." *92 Beuna Vista Ave.*, 507 U.S. at 126, 132-135 (Scalia, J., joined by Thomas J., concurring in the judgment)

(title vests in the government if forfeiture is decreed). Otherwise, the innocent owner defense is rendered meaningless.

7. Forfeiture of proceeds is not a disgorgement of unjust riches but deprives the defendant of property rights in excess of illicit profits.

As shown in the previous section, *Tilley* and its progeny place great weight in the contention that "the forfeiting party loses nothing to which the law ever entitled him." *Tilley*, 18 F.3d at 300, citing *Rex Trailer Co. v. United States*, 350 U.S. 148, 153-54 & n.6 (1956) (explaining that the civil sanction imposed there might avoid unjust enrichment). The *Tilley* court, however, misses the point. *Rex Trailer* involved a scheme to defraud the government at the expense of veterans whom the government intended to benefit.

> Unjust enrichment typically involves the illicit enjoyment of a benefit taken from its rightful owner. Restatement of Restitution 1 (1936). The force of the equitable analogy is diminished where, as here, there simply is no rightful owner to whom the money may be returned.

Titan Court, 75 F.3d at 1486.

In a dramatic example of misplaced reliance, the Seventh Circuit in *Smith* found support in *S.E.C. v. Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994), for its conclusion that forfeiture of proceeds is purely remedial under a disgorgement theory. *Smith*, 76 F. 3d 879, 882-83 (1996), with an argument which the government now espouses. Pet. Br. 49. This misplaced reliance underscores a central fallacy in the government's contention regarding the remedial nature of forfeiting proceeds.

In *Bilzerian* the circuit court dealt with a double jeopardy claim based upon an order, following conviction and sentencing for multiple securities laws violations, that the defendant disgorge the illicit profits of his illegal stock manipulation. *Bilzerian*, 29 F.3d at 693. Bilzerian's claim that the disgorgement order constituted double jeopardy was rejected because "the disgorgement order is remedial in nature and does

not constitute punishment within the meaning of double jeopardy." *Id.* at 698. Significantly, the court explained:

> The [district] court was careful to order disgorgement of the profits caused by Bilzerian's securities viola-tions only. For the shares purchased after his securities violations occurred, the court subtracted Bilzerian's purchase price from the price at which he later sold the stocks based on the theory that all appreciation occurring after his violations was due to his illegal actions.

Id. at 697 (emphasis added). The implication of the court's explanation is that a disgorgement order that did not go to lengths to distinguish net profits derived from illegal transactions from all other funds would constitute, at lease in part, a punitive measure.

Herein lies the rub. As one court put it: We "strongly suspect that the framers of the Double Jeopardy Clause were much more concerned about the reality of punishment than the focus of proceedings." *United States v. Aileman*, 893 F. Supp. 888, 899 (N.D. Cal. 1995). The government's view of proceeds forfeiture as devoid of any measure of loss or punishment to the property owner flies in the face of economic reality. Drug transactions are, after all, finite economic events albeit illegal. Thus, there is necessarily some investment of capital and of labor in the economic endeavor. *Bilzerian* took these factors into account, limiting the disgorgement to net profits; the courts in *Tilley*, *Smith*, or *Salinas* did not. Thus, to say that proceeds forfeiture is purely remedial is simply wrong and in contravention of economic reality.

Yet, beyond the forgoing, there is a far more subtle and sinister message contained in the government's suggestion here. It is the hope that those facing punishment and those who are threatened with the loss of their property deserve *less* constitutional protection than others. Such a proposition is the antithesis of the founding principles of this country. The Bill of Rights was enacted to protect the very same people as those now before this Court — those who stand accused and those who

stand to lose their property interests to the government. The Double Jeopardy Clause component of the Fifth Amendment stands to protect against the exact kind of sanction sought here — separate proceedings which lead to successive punishment with retributive goals for the same conduct.

For all the above reasons respondents submit that *Tilley* and those cases following it failed to apply the analysis mandated by *Austin*. Forfeiture of drug proceeds under § 881(a)(6) contains some punitive aspects, as do all forfeitures brought under § 881(a)(4), (7) or 18 U.S.C. § 981(a)(1)(A). The Double Jeopardy Clause is implicated.

B. The Government's Use of Separate Forfeiture Proceedings to Inflict "Successive Punishment" Violated Respondents' Protection Against Double Jeopardy

The court of appeals correctly determined that the two forms of punishment imposed upon the respondents in this case were necessarily imposed in separate proceedings which in fact placed the repondents twice in jeopardy.

The petitioner argues that, lacking an expectation of finality at the time of sentencing, the respondents were not separately punished by the subsequent forfeitures. This argument ignores precedent, policy, and common sense. The government has lopped off all that does not neatly fit its procrustean theory. In particular, the government ignores the very doctrine intended to prohibit the government's precise litigation strategy against respondents.

1. The criminal prosecution and civil forfeiture proceedings in this case cannot be merged into a single proceeding.

One consequence of the Constitution's bar on being "twice" placed in jeopardy is the doctrine that all punishment for a certain offense must be imposed in a single proceeding. The protection is not against multiple punishments, as such, but against

multiple punishments imposed in separate proceedings: that is, against successive punishments. If double jeopardy protects against successive punishments, what justifies the government's "coordinated prosecution" methodology in the face of double jeopardy claims? The government's answer is that the two proceedings are really only one. Pet. Br. 54.

The government's justification relies on cases where the defendant in effect consented to additional proceedings,[19] and on the theory that government "oppression of the sort against which the Double Jeopardy Clause was intended to protect" amounts to no more than an abuse of the defendant's legitimate expectation of finality. Pet. Br. 57. As the record makes clear, respondents were not the architects of the successive proceedings; the government was. The consent cases therefore do not avail the government's argument. Furthermore, the abuse protected by the Clause far exceeds mere expectations of finality, and putting the modifier "legitimate" into the calculation merely begs the question — when *can* the government be said to be done with the business of punishing?

Common sense dictates that a civil forfeiture proceeding and a criminal prosecution can *never* be the same proceeding for double jeopardy purposes. Under the government's theory, it could commence two prosecutions of the same person on the same criminal charges at on about the same time, either in two districts or before two judges of the same district, and pursue both of them to completion and sentence, without violating the Double Jeopardy Clause. First, the differences between a civil proceeding and a criminal proceeding prevent them from ever being anything but separate proceedings. As the Ninth Circuit concluded:

> We fail to see how two separate actions, one civil and one criminal, instituted at different times, tried at different times before different factfinders, presided

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19 *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 309 (1984); *Ohio v. Johnson*, 467 U.S. 493, 500-01 (1984).

> over by different district judges, and resolved by separate judgments, constitute the same "proceeding." In ordinary legal parlance, such actions are often characterized as "parallel proceedings," but not as the "same proceeding."

Pet. App. 8a. See also *United States v. Torres*, 28 F.3d 1643 (7th Cir.), cert. denied, 115 S.Ct. 669 (1994) ("[t]wo trials, even if close in time, are still double jeopardy").

As the government correctly notes, Pet. Br. 55, the Constitution does not prohibit the government from securing the full range of authorized penalties — forfeiture and incarceration — in the same proceeding. Since 1984, the government has had available criminal forfeiture statutes that Congress designed specifically in order to allow federal prosecutors to join the penalties in one proceeding:

> [t]he problem with civil forfeiture is that even if the same facts that are at issue in a criminal trial are also dispositive of the forfeiture issue, it is still necessary for the government, in addition to the criminal case, to file a *separate* civil suit.

S. Rep. No. 225, 98th Cong., 1st Sess. 196 (1983), reprinted in 1984 U.S. Code Cong.Admin. News 3182, 3379 (emphasis added). The specific provision for criminal forfeiture under 21 U.S.C. § 853 was predicated in part upon the understanding that civil forfeitures were separate proceedings from the corollary substantive prosecutions brought by the criminal division.

2. "Expectations of finality" are an inappropriate gauge of Respondents' double jeopardy interests.

The issue of a defendant's "expectation of finality", which the government claims controls all double jeopardy concerns, arises when the government appeals a punishment — which before *Halper*, meant a *criminal* punishment. See, *e.g.*, *United States v. Caterino*, 29 F.3d 1390, 1397 (9th Cir.), cert. denied, 506 U.S. 843 (1992); *Wilmer v. Johnson*, 30 F.3d 451, 456-57 (3rd Cir.), cert. denied, ___U.S.___, 115 S.Ct. 439 (1994);

and *United States v. Greenwood*, 974 F.2d 1449, 1473-74 (5th Cir. 1992), cert. denied, 113 S.Ct. 2354 (1993). The issue is whether the defendant has a *legitimate* expectation of finality in the sentence; the answer depends upon the government's having unsuccessfully sought a specific punishment at sentencing and its having the statutory power to appeal a sentence. See *United States v. DiFrancesco*, 499 U.S. at 132 (1980) (sentences have a lesser degree of finality than acquittals; there is no expectation of finality in a sentence that the government has the statutory power to appeal); *cf. Stone v. Godbehere*, 894 F.2d 1131, 1135 (9th Cir. 1990) (defendant had a legitimate expectation of finality in his sentence because the Arizona courts had no authority to modify the sentence).

The government argues that an appeal of a criminal sentence following a criminal prosecution is analogous to a criminal prosecution followed by a civil forfeiture: an appeal is brought before an appellate panel rather than a district court trial judge; appeals are assigned a different docket number; and they are often handled by a different government attorney. The government argues that, since these differences do not render an appeal "separate" from the trial, identical differences do not render a prosecutions "separate" from a civil forfeiture.

This superficial analogy to the typical pairing of criminal prosecution and civil forfeiture cannot survive analysis.

The analogy fails to grasp that a civil forfeiture proceeding and a criminal prosecution are not the logical equivalent of a criminal trial and a subsequent appeal. An appeal is a limited continuation of the lower court proceeding, while a civil forfeiture proceeding stands in no such relation to its corollary criminal prosecution. There is simply nothing about the sequencing of trial-then-appeal that makes it the functional equivalent of the combined use of civil forfeiture proceeding coupled along with, or serially to, a criminal prosecution. The Court in *DiFrancesco* permitted the government to seek

- an increased punishment;

- upon a single verdict,
- by exercising its statutory power to appeal from a ruling that denied the government the punishment it had legitimately sought in the intial sentencing.

United States v. DiFrancesco, 449 U.S. 117 (1980).

That the defendant-respondent in a sentencing appeal has no legitimate expectation of finality sheds no light upon the circumstances facing the individual respondents here.

The false analogy aside, absence of finality does not overcome the Double Jeopardy Clause's fundamental prohibition. The "successive punishments" threatened by tandem civil forfeiture and criminal prosecution breach the battlement erected against governmental overreaching:

> The basis of the Fifth Amendment protection against double jeopardy is . . . that an accused shall not have to marshall the resources and energies necessary for his defense more than once for the same alleged criminal acts.

Abbate v. United States, 359 U.S. 187, 198-99 (1959); and see *Kurth Ranch*, 114 S.Ct. at 1941.[20]

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[20] This Court has readily recognized the double jeopardy implication of the government's use of civil penalty proceedings to extract punishment. Most recently the Court addressed the problem in *Kurth Ranch*:

> This case presents the question whether a tax on the possession of illegal drugs assessed after the state has imposed a criminal penalty for the same conduct may violate the constitutional prohibition against *successive punishments* for the same offense.

114 S.Ct. at 1941. Respondents recognize that proceedings under 21 U.S.C. § 881(a) and 18 U.S.C. § 981(a), are not "criminal proceedings" under the Sixth Amendment nor easily categorized as pervasively penal (*Kennedy/Ward*). This Court has shown, however, that double jeopardy protection is not limited to prosecutions (*Halper/Kurth Ranch*), nor does the text of the Fifth Amendment suggest that twice imposing jeopardy of punishment for the same offense is restricted to criminal prosecutions as contrasted with the Sixth Amendment.

The abuse is made more onerous by the interaction of the two litigations: each makes it more difficult for the target to defend agaisnt the other. The government's argument that there was no "ripened" expectation of finality in the criminal judgment and sentence, Pet. Br. 55, ignores this core protection of the double jeopardy clause. The inherent substantive differences between the two types of proceedings illustrates the abuse:

- the civil case proceeds on an indefinite track, while the criminal case must generally be resolved within Speedy Trial Act requirements;
- the civil case places the burden on the defendant, while the government bears the burden in the criminal case;
- according to some courts the government may rely upon hearsay in the civil case to establish its prima facie burden (probable cause), while the defendant has the right to confront accusers in the criminal case;
- the parties have virtually complete discovery in the civil case, while the criminal case is tried under minimal requirements for constitutional disclosure;
- the claimant must find and retain counsel for the civil case, while counsel can be appointed in the criminal case.

These functional differences virtually assure that the claimant/defendant will be forced to mount two separate and different defenses on two separate and different fronts.

3. The multiple punishment prong has traditionally focused on single verdict proceedings.

The Double Jeopardy Clause protects finality in the special case of multiple punishments arising from a single verdict. This special case has given rise to an entire subset of double jeopardy doctrine, most often grouped within the multiple punishment prong. The origin of the finality doctrine reveals its limited

application.

In *Ex parte Lange*, this Court held that the defendant could not be dealt sentences in excess of the statutory authority, nor could the trial court impose an additional sentence following the defendant's satisfaction of the original penalty. This second holding reveals the Court's concern regarding multiple punishment.

> The petitioner, then, having paid into court the fine imposed upon him . . . and he having also undergone five days of the one year's imprisonment, all under a valid judgment, can the court vacate that judgment entirely, and without reference to what has been done under it, impose another punishment on the prisoner *on that same verdict*? To do so is to punish him twice for the same offense. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing.

Ex parte Lange, 85 U.S. (18. Wall.) 163, 175 (emphasis added). The Court further explained that this prohibition was a consequence of the constitutional ban on multiple trials.

> For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced *on the same verdict*? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is *the punishment* that would legally follow the second conviction which is the real danger guarded against by the Constitution.

Ex parte Lange, 85 U.S. at 173 (emphasis added). Accord *United States v. DiFrancesco*, 449 U.S. 117 (1980) (government sentencing appeal is permissible over *Lange's* bar where an authorizing statute provided notice of the extended proceeding and the appeal is limited to a claim for authorized punishment sought but denied at the initial sentencing).[21]

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[21] Compare *Bozza v. United States*, 330 U.S. 160, 165–67 (1947) (no double jeopardy where fine added under mandatory statutory language; sentencing court had no authority to fail to

The fundamental purpose of the Double Jeopardy Clause is to prohibit the state — with all of its resources and power — from making repeated attempts to *punish* an individual for an alleged offense. *Green v. United States*, 355 U.S. at 187-188 (1957). As noted by this court in *Ohio v. Johnson*, 467 U.S. at 498-99 (1984), the Double Jeopardy Clause serves the corollary goal of protecting an individual from the "embarrassment, anxiety and expense" of repeated government attempts to punish. These are the "humane interests" served by the Double Jeopardy Clause's prohibition against multiple punishments. See *Halper*, 490 U.S. at 447.[22]

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include fine) with *In re: Bradley*, 318 U.S. 50 (1943) (receipt of fine terminated power of court to further impose punishment in *Lange* -type election of fine or inprisonment, even by ordering refund of fine).

22 The government argues that *Halper* was merely an extension of the *second* principle of *Ex Parte Lange*, i.e., the rule prohibiting re-sentencing once the defendant has a legitimate expectation in finality. Pet. Br. 27-28. This suggestion contradicts this Court's holding in *Halper* which was explicitly based upon the third protection addressed by the Double Jeopardy Clause and not, as the government would suggest, the protection against additions to a single sentence meted out from a single verdict.

> This court many times has held that the double jeopardy clause protects against three distinctive abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishment for the same offense. See *e.g.*, *North Carolina v. Pearce*, 395 U.S. 711, 717 [ ] (1969). The third of these protections —*the one at issue here* — has deep roots in our history and jurisprudence.

United States v. Halper, 490 U.S. at 440 (emphasis added). See also *Witte v. United States*, 515 U.S. ___, 115 S.Ct. 2199, 2204 (1995).

4. Successive punishments meted out under civil *in rem* and criminal proceedings constitutes separate proceedings under the Double Jeopardy Clause.

This Court has already reviewed a double jeopardy case involving parallel civil and criminal proceedings. In *Dept. of Revenue of Montana v. Kurth Ranch*, 114 S.Ct. 1937 (1994), this Court described a highly coordinated, overlapping set of civil and criminal proceedings against marijuana growers as "separate proceedings." These separate attempts to penalize the Kurths were condemned, correctly, as "successive punishments."

The State of Montana sought to impose a tax on illegal drugs assessed after the defendants were prosecuted in state court. This Court accepted review in order to determine whether the tax "violated the constitutional prohibition against *successive* punishments for the same offense." *Kurth*, at 1941 (emphasis added).

Kurth Ranch involved four contemporaneous proceedings: a criminal prosecution, a civil forfeiture, a civil tax assessment, and a bankruptcy proceeding. The order of events in *Kurth Ranch* is similar to that faced by the individual respondents here. In *Kurth Ranch*, the criminal case and the tax proceeding—all plainly authorized by statute—were initiated months apart but were pending at the same time — yet this Court considered the proceedings to be separate. As observed by this Court, "[t]he raid put an end to the marijuana business and gave rise to four *separate* legal proceedings." *Kurth Ranch*, 114 S. Ct. at 1942 (emphasis added). This Court further observed:

> Montana no doubt could collect its tax on the possession of marijuana, for example, if it had not previously punished the taxpayer for the same offense, or indeed, if it had assessed the tax in the *same proceeding* that resulted in his conviction.

Id. 114 S. Ct. 1945 (emphasis added). Finally, the Court noted:

> Nor does the statute require us to comment on the

possibility of "multiple punishments" imposed in the same proceeding [citation omitted], *since it involves separate sanctions imposed in successive proceedings.*

Id. at 1947 n. 21 (emphasis added). As Judge Easterbrook observed: "[I]f as *Kurth Ranch* holds, a civil proceeding to collect a monetary penalty for crime counts as an independent "jeopardy," it does not require much imagination to see the problem. Civil and criminal proceedings are not only docketed separately but also tried separately, and under the double jeopardy clause separate trials are anathema." *United States v. Torres,* 28 F.3d 1463, 1465 (7th Cir), cert. denied, 115 S.Ct. 669 (1994).

As in *Kurth Ranch*, the proceedings here were neither filed nor resolved simultaneously. Different courts and factfinders handled each proceeding. Each proceeding afforded the parties different rights and burdens. To find that these two cases, the civil forfeiture and the criminal prosecution, were somehow part of the "same proceeding" so as to find that the government did not seek to punish the respondents "twice", contradicts the black and white facts of the case as well as common sense. *Kurth Ranch* put the question to rest in its observation that the phrase "same proceeding" means "the same proceeding that resulted in [the] conviction." *Kurth*, 114 S.Ct. at 1945.

C. Respondents' Civil Forfeitures And Criminal Prosecutions Twice Punished Them "For The Same Offense.

The government argues that the *Blockburger* "same elements" test is not met with repect to either the controlled substance or money laundering violations. Pet. Br. 50-53. Because the government's argument relies upon a false premise, its conclusions are without merit.

1. Civil *in rem* forfeitures are not themselves "offenses" *per se* but are punishments.

The government wholly miscontrues this lesson and argues

against precedent, common sense, and even syntax that "civil *in rem* forfeiture amounts to an 'offense'." Pet. Br. 50. Construing civil forfeiture as an offense, the government artfully concludes that its "elements" are not the same as — or a lesser included offense of — the substantive criminal offense, thus purpotedly overcoming the *Blockburger* test. *Blockburger,* 284 U.S. 299 (1932). The argument proceeds from false assumptions.

Halper held, without equivocation, that civil sanctions, under appropriate circumstances, were "punishment as we have come to understand the term." *United States v. Halper*, 490 U.S. 435, 448 (1989).

As we have shown above in Part A and B, *ante*, the forfeitures against Respondents Arlt and Wren in this case were *per se* punishment. Nothing in *Halper* or *Austin*, or in any other opinion issued by this Court, suggests that forfeitures could be viewed as offenses, or that the test to determine when facially civil sanctions were pervasively penal (and therefore entitling defendants to greater due process protections) had been discarded.

The government's assertion that civil forfeiture is its own offense is, in essence, an attempt to characterize the proceeding as pervasively penal pursuant to *Kennedy v. Martinez-Mendoza*, 372 U.S. 144 (1963) and *United States v. Ward,* 448 U.S. 242 (1980) yet distinct from the corollary substantive offenses in Title 21. This straw-man argument rewrites decades of this Court's guidance. Double jeopardy is offended not because the civil sanction is a separate prosecution, or a pervasively penal proceding, but because its sanction is punitive either through its disproportionality to the government's actual losses or because the sanction was aimed at deterrence and retribution *ab initio.*

2. The Court has never applied *Blockburger's* "same elements" test in the forfeiture context.

In *United States v. Halper*, a unanimous Court applied a factual test to determine whether double jeopardy was offended. *Halper,* 490 U.S. 435 (1989). The government's attempt to seek

criminal and civil penalties in separate proceedings parallels the two-front strategy used against rsespondents. The Court neatly focused on the facts of Halper's conviction and read the civil sanction as further penalty for the same offense punished in the criminal proceeding:

> Nothing in today's ruling precludes the Government from seeking the full civil penalty against a defendant who previously has not been punished for the *same conduct*, even if the civil sanction imposed is punitive. In such a case, the Double Jeopardy Clause simply is not implicated . . . In other words, the only proscription established by our ruling is that the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action *based on the same conduct.*

Halper, 490 U.S. at 450-51 (emphasis added). The analysis of "same conduct" in the case of civil penalties is entirely distinct from the analysis's brief and ill-fated application in criminal cases.[23] In the civil penalties context, as distinct from the criminal setting, *the Court is not comparing two offenses.* Rather, the Court has examined whether the defendant's acts giving rise to the civil sanction constitute the same offense as was brought in the criminal prosecution. Only one offense is present; the only task is to determine whether the civil punishment was sought for the same offense as the prosecution.

Most tellingly, *Halper's* factual evaluation was *not* challenged following *Dixon* and the re-establishment of the "same elements" test for criminal offenses.[24] The Double Jeopardy clause's "same

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[23] *Grady v. Corbin*, 495 U.S. 508 (1990) (modifying *Blockburger* and announcing a "same conduct" test in multiple prosecution cases; overruled by *United States v. Dixon*, 509 U.S. 688 (1993)).

[24] Respondents do not suggest that *Dixon* is in error. In the criminal setting, the *Blockburger* "same elements" test is the appropriate analysis. As we demonstrate, however, *Blockburger* does not give us the appropriate guidance when analyzsing civil sanctions and their corollary criminal offenses. The phrase "same conduct," as used in *Halper* and *Kurth Ranch*, means nothing

offense" requirement is analyzed in the civil penalty context by following two inquires, one statutory, one factual. The factual question in this case is whether the forfeiture was premised on the respondents' conviction[25]; the statutory question is whether the criminal offense is subsumed within the civil sanction. If the answer to both questions is "yes" then the two proceedings contemplate punishments for the "same offense."

Additional evidence that a factual review applies to civil penalties is found in *Kurth Ranch* where this Court applied a "same conduct" analysis to a civil penalty/tax. No member of this Court questioned the application of the "same conduct" standard in civil proceedings. The majority framed the civil action issue in *Kurth Ranch* this way:

> This case presents the question of whether a tax on the possession of illegal drugs assessed after the State has imposed a criminal penalty *for the same conduct* may violate the constitutional prohibition against successive punishments *for the same offense.*

Kurth Ranch, 114 S.Ct. at 1941 (1994) (emphasis added). Thus the government's argument that the "same elements" test applies to respondents is inconsistent with this Court's decisions in *Halper* and *Kurth Ranch.*

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more than that the defendants must show that the civil sanction arises from the same facts as the "unit of prosecution" involved in the criminal proceeding. In a series of drug distributions, Tuesday's sale may support a forfeiture and Friday's separate sale a prosecution. If on all the facts of the case the two events are genuinely different units of prosecution then they are not the "same offense" for Double Jeopardy purposes.

[25] As shown above, where the facts underlying the forfeiture are distinct from the criminal prosecution double jeopardy is not violated. If the forfeiture was triggered by an offense other than the one for which the claimant was already punished, an additional punishment would not offend.

3. The factual or "unit of prosecution" approach is correct because forfeiture — even criminal forfeiture — is not an offense.

In *Libretti v. United States*, 516 S.Ct. 356 (1995) this Court held that criminal forfeiture was not an "offense" with elements but a "punishment." Similarly, civil forfeiture is not an offense — even syntactically this is obvious as one never speaks of a defendant being guilty of forfeiture or committing a forfeiture — it is a sanction. The *Blockburger* elements-of-the-offense test has no application to these circumstances.

4. In the instant case, the factual and statutory questions are easily resolved.

The trial court granted summary judgment in favor of the United States based upon the respondents' prior convictions for controlled substance and money laundering violations. The government's theory below asserted that the property was forfeitable because of the jury's verdict against respondents for the same charged offense as supported the forfeitures.[26]

Finally, it is apparent from the texts of the statutes themselves that 21 U.S.C. § 881(a)(6) and § 981(a)(1)(A) both authorize forfeitures only upon conduct which wholly subsumes the crimes for which respondents were convicted. The allegations which gave rise to respondents' forfeitures included the same allegations giving rise to their criminal prosecutions: i.e., violations of 21 U.S.C. § 841(a) (1) and § 846, plus 18 U.S.C. § 371 and § 1956.

5. Civil forfeiture and the underlying criminal offenses are a species of greater and lesser included offenses under the *Blockburger / Dixon* "same offense" test.

Even if respondents' forfeitures were an "offense," as the petitioner argues, they are offenses which wholly subsume the

26 The question is, What conduct did the government rely upon in its civil case? In Respondents' case, summary judgment was based on the very offenses that resulted in respondents' convictions and little else.

substantive criminal offenses set forth in Title 21 and the money laundering statutes. Consequently, the government's efforts to forfeiture respondents' property sought to inflict a second punishment for the same offenses for which respondents were previously prosecuted.

a. Under the *Blockburger* test,[27] two offenses are "different" only if each contains an element not present in the other. Otherwise, they are considered the "same offense" under the Double Jeopardy Clause which thus bars both additional punishment and successive prosecution of such offenses. *Dixon*. Because a lesser-included offense never has an element additional to its greater offence, the Double Jeopardy Clause forbids multiple punishment or prosecution of greater and lesser–included offenses.[28]

This Court has also held that the lesser–included offenses approach applies to statutory crimes in which one offense includes as an element a variety of possible lesser offenses. For example, in *Whalen v. United States*, 445 U.S. 684 (1980), the criminal code for the District of Columbia established that any one of six specified felonies could serve as a required element of felony-murder. Examining whether multiple punishment barred both a rape conviction and a felony murder conviction based upon the same rape, the Court held that this type of statute presents a situation no different from the typical greater and lesser-included offense paradigm. *Id.* at 694 ("[W]e are unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense"). In successive prosecution cases, this Court has similarly called the underlying predicate

27 284 U.S. 299 (1932).

28 When one offense contains all the elements of another offense plus additional aggravating elements, the first offense is denominated the greater offense, and the latter is called the lesser included. Thus, the lesser included offense will have no elements distinct from the greater offense. In successive prosecution cases, it does not matter which prosecution comes first. *Brown v. Ohio*, 432 U.S. 161, 169 (1977).

felonies, "a species of lesser-included offense." *Dixon*, 113 S.Ct. at 2857; quoting *Illinois v. Vitale*, 447 U.S. 410, 420 (1980); accord, *Harris v. Oklahoma*, 433 U.S. 682 (1977). Thus, when a greater offense contains an element that may be satisfied by any number of discrete criminal offenses, this Court's teachings prevent an abstract approach that ignores the actual predicate crime charged in the case. Instead, *Blockburger* requires that the actual predicate crime charged in each case be inserted into the variable element of the greater offense. To require otherwise would eliminate any meaningful protection from the Clause.

b. Section 881(a)(6) provides for forfeiture of "moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all [such items] used or intended to be used to facilitate any violation of this subchapter." Under this section, the combination of either actual or intended use with the three methods of use — payment, proceeds, or facilitation — yields six different predicate scenarios under which the government can seek forfeiture. As demonstrated above, the *Blockburger* test requires that the actual scenario charged by the government be examined for purposes of a double jeopardy analysis.

In this case, the government moved for summary judgment in the forfeiture proceeding alleging that the claimants' criminal convictions were a sufficient predicate to satisfying this element of forfeiture. Pet. App. 6a; Resp. Arlt's Br. in Opp. 113a-114a. Under the *Blockburger* principles discussed above, if the forfeitures are to be veiwed as a kind of "offense," then the claimants' criminal convictions are thus no more than "a species of lesser included offenses" in relation to the forfeiture, and hence, act as a bar to the prosecution of that claim. See also *United States Titan Court*, 75 F.3d 1470.

The government advances several arguments that the criminal statutes at issue contain additional elements to the

forfeiture statutes. ("The forfeiture statutes do not require proof of any particular crime, . . . the participation of the property owner . . . proof that the owner entertained a mental state required for a criminal conviction.") Pet. Br. 51-52. These arguments all simply ignore this Court's rule that the greater offense cannot be "abstracted from the 'element' of the violated condition." *Dixon*,113 S.Ct. at 2852 (1993). For example, the petitioner's argument that the forfeiture statute does not require the commission of any particular crime is akin the argument dismissed in *Harris v. Oklahoma*, 433 U.S. 682 (1977) where the Court held that a successive prosecution for robbery with firearm is not precluded by a felony-murder conviction predicated upon the same robbery with a firearm.[29] For the same cogent reasons this Court should reject the government's argument here.

Similarly, the government argues that forfeiture may be had even if the property was only "intended" to be used in a drug offense but before any crime had in fact been actually committed. Pet. Br. 52. Be that as it may, the fact is the government chose to seek forfeitures against Respondents based upon their criminal convictions. In this respect, the Court's discussion of this "species of lesser-included offenses" in *United States v. Dixon* is instructive. The *Dixon* defendants were prosecuted first for criminal contempt for violation of an existing court order, and later indicted for criminal offenses arising out of the same incidents underlying the contempt convictions. In applying the *Blockburger* test, the Court rejected the government's argument that the elements of contempt be applied in the abstract — knowledge of a court order and a willful violation of that order. Instead, the majority opinion examined the underlying court order to specify the elements of the "greater offense" of contempt in each case. For example, for

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29 Similarly, if the claimants were not prosecuted in the underlying criminal case, they obviously would not have a double jeopardy claim. Fundamentally, all the government's arguments "apply *Blockburger* at too abstract a level." *Titan Court*, 75 F. 3d at 1490 (1996).

Alvin Dixon, the trial court order directed the defendant not to commit "any criminal offense" while on release for another charge. A subsequent drug offense became the basis for both the contempt conviction and the later criminal indictment. The Court held that the court order, "incorporated the entire governing criminal code in the same manner as the *Harris* felony-murder statute incorporated the several emunerated felonies." *Dixon*, 113 S.Ct. at 2857. As a result, the drug indictment did not contain any element not contained in his previous contempt conviction and this prosecution was therefore barred by Double Jeopardy.[30]

As with *Dixon*, this case requires an "anomalous" application of the *Blockburger* test: the greater-included proceeding is denominated as a "civil" case. See *Dixon*, 113 S.Ct. at 2855 (these cases are the "consequence of an historically anomalous use of the contempt power"). Here, because the statutory provisions for forfeiture denominate the "offense" as a civil wrong, they contain remedies for conduct that are not necessarily criminal. Nevertheless, this Court has applied constitutional protections to such "civil" forfeitures when the forfeiture involves a violation of a criminal statute.[31] Respondents faced no less: the goverment

30 In the companion case, Michael Foster was tried for various violations of a civil protection order ordering him not "molest, assault, or in any manner threaten or physically abuse" his estranged wife. He was later indicted by the grand jury based on a number of the same incidents from the contempt hearing. *Dixon* a1113 S.Ct. at 2853-54.

31 Civil forfeitures often reference a criminal violation, and such statutes are distinct from merely regulatory enactments. For example, this Court examined a Customs statute that authorized the forfeiture of property for regulatory violations, regardless of any underlying criminal conduct. *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 236 (1972) (per curiam). The absence of a criminal component reduced the owner's claim to constitutional protections. With respect to forfeitures predicated upon criminal violations, however, the law has long been otherwise:

> But as *Boyd v. United States*, 116 U.S. 616, 634 (1886),

sought to impose punishment in two successive proceedings, and the punishments depended upon the literal violation of the same offenses for which respondents were previously criminally tried, convicted, and punished.

The government seeks to escape from the scrutiny of the Double Jeopardy Clause in this case by cloaking its efforts to punish respondents twice as a merely civil pursuit of a civil remedy. Instead, the line of cases beginning with *Harris* and through *Dixon* require that the elements of this forfeiture include the actual underlying criminal offenses used by the government as the predicate for forfeiture. When examined in this light, the Ninth Circuit was correct in holding that if the Wren forfeiture can be called an "offense" at all, it was a greater offense of the criminal cases and was hence barred by the Double Jeopardy Clause.[32]

> makes clear, "proceedings instituted for the purpose of declaring the forfeiture of a man's property *by reason of offences committed by him*, though they may be civil in form, are in their nature criminal" for Fifth Amendment purposes.

Id. n. 6. This precise analysis has been applied to modern *in rem* forfeitures. *One 1958 Plymouth Sedan v. Commenwealth of Pennsylvania*, 380 U.S. 693 (1965); *United States v. United States Coin & Currency*, 401 U.S. 715, 718 (1971).

32 The government contends that forfeiture and the underlying criminal offenses are not greater and lesser-included offenses because this relationship does not exist unless "every violation of the statute defining the greater offense 'necessarily entails a violation of' the statute defining the lesser offense." citing *United States v. Woodard*, 469 U.S. 105, 107 (1985) (*per curiam*); *Brown*, 116 U.S. at 634; and *Schmuck v. United States*, 489 U.S. 705, 716, 719 (1989). However, none of these cases involves the classic *Harris* statutory scheme which involves a greater offense with a number of qualifying predicate crimes for a particular element. Obviously, once the predicate crime is inserted in the variable element, as these cases require, a violation of the greater offense will necessarily involve a violation of the lesser-included offense.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be affirmed.[33]

Respectfully submitted.

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MARCH 1996

Respondents wish to specially acknowledge the contribution of Michael L. Montalvo, inmate law student (28 C.F.R. § 543.11(f)).

Respondents also acknowledge the contribution of Peter Goldberger and David Zlotnick of Families Against Mandatory Minimums; Robyn Pugsley; Harlan Boyd; Brenda Grantland; and the National Association of Criminal Defense Lawyers' Forfeiture Task Force.

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33 Petitioner seeks reversal. Respondents, however, raised issues other than the double jeopardy bar to their *in rem* forfeiture. The appellate court did not reach these other issues except in dicta regarding the lack of probable cause. Because other issues were not reached in the court below, the government's remedy, at most, would be a remand.

No. 94-1646

In the Supreme Court of the United States

October Term 1995

UNITED STATES, PETITIONER,

v.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET AL., RESPONDENTS

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Did the *in rem* forfeitures of respondents' property under 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) violate the Fifth Amendment's protection against being twice placed in jeopardy of punishment for the same offense?

a. Do *in rem* forfeitures constitute "punishment," even if premised, *inter alia,* on a "proceeds" theory?

b. Did the government seek the forfeitures in a proceeding "separate" from the underlying criminal prosecution and sentencing?

c. Was the government's attempt to forfeit repondents' property premised on the "same offence" as respondents' criminal convictions, for which they were already serving life imprisonment?

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COUNTERSTATEMENT OF THE CASE

On June 12, 1991, a grand jury sitting in the Central District of California indicted respondents for conspiracy to manufacture methamphetamine [21 U.S.C. § 846], and 19 counts of money laundering [18 U.S.C. § 1956(a)(1)]. Pet. App. 79a-105a.

On June 17, 1991, the Petitioner commenced a civil forfeiture action against the defendant properties listed in the caption (hereinafter "the properties"). Pet. App. 30a-31a. The civil complaint alleged the same facts and same criminal violations set forth in the criminal indictment against respondents Arlt, Wren, and others. Pet. App. 33a-42a, 79a-105a. The government invoked *in rem* forfeiture statutes 21. U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) in the civil complaint. Petitioner has maintained possession of the properties since their seizure in July, 1991.

On March 27, 1992, respondents Arlt, Wren, and others were found guilty of the indictment charges. Pet. App. 106a-108a. On December 4, 1992, while Arlt and Wren were serving their sentences in prison, the government filed its motion for summary judgment in the forfeiture action. Resp. Arlt's Br. in Opp. 1a-29a. The government's "uncontroverted facts and conclusion of law" established its probable cause burden by using the criminal indictment, prosecution, jury verdict, and judgment and commitment as the grounds for summary judgment in the civil proceedings. Pet. App. 55a-72a.

On January 26, 1993, respondents Arlt and Wren, *pro se*, opposed the government's motion for summary judgment by vigorously disputing the government's alleged "uncontroverted facts." Resp. Arlt's Br. in Opp. 48a-54a. Respondents raised material questions of fact regarding whether the cash transactions were legal in themselves. Resp. Arlt's Br. in Opp. 31a-34a, 50a-52a.

On March 23, 1993, respondents Arlt and Wren moved to strike portions of the government's reply to claimants'

opposition to motion for summary judgment. Resp. Arlt's Br. in Opp. 58a-70a. Respondents' declaration and exhibits demonstrated a legal source of the vehicles, boat, airplane, personal property, silver bars, and money in several accounts. Resp. Arlt's Br. in Opp. 48a-52a. Respondents demonstrated the legal procedure they used when making chemical orders or cash purchases, and contended that use of cash is normal and not *per se* proof of mysterious drug activity. *Id.* The only fact not in dispute was that the government met its burden of proof of the probable cause for forfeiture based on precisely the same conduct and violation as in the criminal indictment, prosecution, and convictions of respondents Arlt and Wren. Pet. App. 61a-72a; Resp. Arlt's Br. in Opp. 58a-68a.

On April 1, 1993, the district court granted the government's motion for summary judgment and adopted in full the government's allegations in its "uncontroverted facts and conclusions of law" which incorporated the indictment and criminal prosecution. Pet. App. 75a-78a. Following the district court's denial of respondents' request for reconsideration, respondents filed a timely notice of appeal on June 15, 1993. The government argued, *inter alia*, that its burden of proof (probable cause) was satisfied by Arlt's and Wren's criminal indictment, prosecution, and convictions for the offenses underlying this forfeiture complaint. Resp. Arlt's Br. in Opp. 113a-114a.

On September 6, 1994, the Ninth Circuit panel ruled that multiple punishment occurred when a civil forfeiture under either 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) is based on the same conduct as the claimants' criminal judgment and sentence. Pet. App. 1a-23a. The panel did not reach the merits of the respondents' other claims, but stated in footnote 2:

> Although the claimants relief would be incomplete if we were to rest our decision on probable cause, and thus we do not reach that ground, it seems clear that the government lacked such cause for the institution of these proceedings. In seeking to satisfy its probable cause burden the government relies almost exclusively on Arlt's and Wren's criminal convictions.

Pet. App. 5a; see also Pet. App. 18a. The decision stated that the government invited the double jeopardy problem in order to "obtain a significant advantage":

> [I]f it succeeded in the criminal case it could obtain summary judgment based on the conviction (assuming that it had probable cause at the time it instituted the forfeiture action), while if it lost it could still seek forfeiture and urge that the more lenient standard applicable in civil proceeds applied. See 1 David B. Smith, *Prosecution and Defense of Forfeiture Case*, ¶ 10.01, at 10-4 to 10-5 (1993).

33 F.3d at 1217; Pet. App. 9a-10a.

In a footnote, the panel specifically noted the threatened abuses of the type of successive employed by the petitioners. Pet. App. 10a, n.6.

The government sought rehearing on October 14, 1994. The panel affirmed its opinion and amended with a one sentence notation that its categorical approach characterizing § 881(a)(6) as punishment was compelled by this Court's decision in *Dept. of Revenue of Montana v. Kurth Ranch,* 114 S.Ct. 1937 (1994). Pet. App. 25a. A dissent from the rehearing denial raised legal objections to the characterization of proceeds forfeitures as punishment and posed the specter of wholesale jail releases. Pet. App. 25a-29a.

The government filed its petition for certiorari on August 29, 1995. Certiorari was granted on January 12, 1996.

Introduction and Summary of Argument

This case arises out of the implication of several of this Court's recent decisions.

> "We know from *Austin v. United States*, [], 113 S. Ct. 2801 (1993), and *United States v. Halper*, 490 U.S. 435 (1989), that forfeiture and civil fines can be penalties for crime, and from *Halper* and *Dept. of Revenue of Montana v. Kurth Ranch*, [511] U.S. ___, 114 S. Ct. 1937 (1994), that a financial exaction (in *Kurth Ranch*, a tax imposed only on persons arrested for drug offenses) can count as a separate jeopardy. *Austin* involved 21 U.S.C. § 881, the same statute invoked to forfeit [the respondent properties]."

United States v. Torres, 28 F.3d 1463, 1464 (7th Cir. 1994). The holdings and logic of this Court's unanimous decisions in *Halper* and *Austin* dictate that the forfeitures imposed in this case were, at least in part, punitive. The government's two-punch strategy "twice" placed respondents Arlt and Wren "in jeopardy" of punishment for the "same offence." More than an abstract encounter with "jeopardy," the trial court's order granting summary judgment in favor of wholesale forfeiture of all the respondents' assets resulted in their being twice punished — in separate proceedings — for the exact same offenses for which they were serving life sentences. Under long–established precedent, extending back more than 120 years[1] ,the second punishment violated the Double Jeopardy Clause of the Fifth

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[1] *Ex Parte Lange*, 85 U.S. (18 Wall.) 163 (1873). Although this Court's precedents reach back over a century, the amendment's roots issue from earliest English law, *id.* at 168-69, derived from Roman law, and ultimately are traceable to Athenian law and Democracy's antiquity. Demosthenes, *Against Leptines*, ¶ 155, http://www.perseus.tufts.edu/cgi-bin/text?lookup= dem.+20.155 ("For you are of course aware that for each grave offense a single penalty is provided by the law, which says explicitly that 'at any trial there shall be not more than one assessment of penalty, whichever the court imposes, whether a personal punishment or a fine, but not both.'").

Amendment.[2]

The preeminent principle of the Double Jeopardy Clause is a limit upon the government's power to punish: "the government, with all its resources and powers, should not be allowed to make repeated attempts to punish an individual for the same offense." *Green v. United States*, 355 U.S. 184, 187 (1957); *United States v. Dixon*, 509 U.S. 688, ___, 113 S.Ct. 2849, 2882 (1993) (Souter, J., concurring in part and dissenting in part); *Garrett v. United States*, 471 U.S. 773, 795-796 (1985) (O'Connor, J., concurring); *Ohio v. Johnson*, 467 U.S. 493, 498-499 (1984); *Burks v. United States*, 437 U.S. 1, 11 (1978). Petitioner challenges this commonsense conclusion and rewrites the entire body of relevant precedent. Failing a wholesale revision, petitioner then seeks to reconstruct the holdings of *United States v. Halper*, 490 U.S. 435 (1989), *Austin v. United States*, 113 S. Ct. 2801 (1993), and *Dept. of Revenue of Montana v. Kurth Ranch*, 114 S.Ct. 1937 (1994), giving them a crabbed and fact-bound reading. Against petitioner's measure, these cases make little historical sense and bear little significance in the development of double jeopardy jurisprudence.

Principles of *stare decisis* alone require a principled adherence to these cases, for ultimately, if these holdings were diminished, the Double Jeopardy Clause would suffer "a narrow, grudging application." *Green*, 355 U.S. at 198.

The Petitioner then warns of dire policy ramifications if the Court does not bring these cases to rein. Respondent Ursery correctly characterizes petitioner's parade of horribles as no more than red herrings on parade. Ursery Br., § A.3. Most fundamentally, "[t]he right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be

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[2] Altogether silent as to prongs and prosecutions, the Clause states: no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb."

highly valued."*Green*, 335 U.S. at 198.

A. Forfeiture Under 21 881(a)(6) Is Punishment, Even If the Property Represents, In Whole or In Part, Proceeds of Criminal Activity.

Prior to *Halper*, proceedings which could result in punishment were either denominated by Congress as "criminal" or were of a nature so plainly akin to a prosecution that the proceeding was judicially deemed pervasively penal and invested with the full complement of due process guarantees. In *Halper*, this Court recognized that punishment for Double Jeopardy purposes may also be imposed through an inherently civil proceeding. *United States v. Halper*, 490 U.S. 435 (1989). Although such proceedings may fall short of the a prosecution and thus not implicate all the protections of the Sixth Amendment, they nevertheless implicated the Double Jeopardy Clause insofar as they threatened to impose a punishment "as we have come to understand the term." *Halper*, 490 U.S. at 448. After *Halper*, a civil proceeding raises double jeopardy concerns when either

(1) in the case of a wholly remedial statute, the sanction is disproportionate to the statute's remedial goal,[3] or

(2) in the case of a statute aimed at deterrence or retribution, the sanction is not justifiable solely by reference to its remedial goals[4],

so that the sanction may be said to be punishment. The denomination "civil" or "criminal" is not of paramount importance: the nature of the statute and its sanction control whether double jeopardy protection applies to successive proceedings.

Austin relied upon this Court's earlier determination in *Halper* that a penalty which Congress intended to be punitive, or

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[3] The so-called "rare case." Pet. Br. at 11; *Halper*, 435 U.S. at 449.

[4] A categorical test, not requiring the case-by-case analysis necessary to analyse the remedial-type sanctions.

which could not be justified for solely non-punitive purposes, is punishment under the Double Jeopary Clause. The historical understanding of forfeitures such as those in 21 U.S.C. § 881(a)(4) and (a)(7) confirmed that the statutes imposed punishment: they focused on the owner's culpability by authorizing the forfeiture only if the owner was tied directly tothe commission of a crime; and Congress intended that they serve the dual goals of punishment: retribution and deterrence.

There is nothing which differentiates property the government seeks to define as proceeds under 21 U.S.C. § 881(a)(6) from any other type of property subject to forfeiture, including conveyances, homes, instrumentalities, and all other porperty described in 21 U.S.C. § 881(a)(4), (a)(6), or (a)(7).

Every circuit that has considered the issue has correctly concluded that *Austin*, in applying the principles first enunciated in *Halper*, determined that civil *in rem* orfeitures were meant, at least in part, to punish and that such punishment implicated the Double Punishment Clause of the Fifth Amendment as well as the Excessive Fines Clause of the Eighth Amendment.

B. The proceedings were separate.

The criminal and civil proceedings against respondents were as separate as they could be. The petitioner argues that a proceeding is impermissibly successive only if it occurs after the defendant/claimant's expectation of finality has ripened in the prior proceeding. Pet. Br. 55-56. This argument fails to acknowledge the literal protection afforded by the Double Jeopardy Clause. The plain language of the Clause limits the government's ability to seek punishments through multiple or successive proceedings.

"Expectation of finality," the government's linchpin, applies only to those instances where the government has sought to revisit a particular punishment after a singular verdict.[5] Finality,

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[5] "Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by

notwithstanding the government's elaborate recasting of this Court's recent decisions, does not play any role in determining whether a civil *in rem* forfeiture is itself separate from the criminal sentence, so that the defendant can be seen as "twice" facing risk of punishment. As set forth in Part A, *post*, the determinative characteristic of 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) is punishment: both statutes impose punishment entirely separate from their corollary criminal offenses; both require new verdicts, not merely additional fact-finding; and neither is imposed as part of the original judgment of sentence. Timing, finality, and the order of proceedings do not alter this fundamental characteristic.

To be sentenced and then to have one's property forfeited is to be punished twice within the meaning of the Double Jeopardy Clause.

C. Respondents' forfeitures were for the "same offense" as respondent's prior convictions.

Forfeitures under 21 U.S.C. § 881 and 18 U.S.C. § 981 are punishments "as we have come to understand the term," not "offenses". *Austin v. United States*, 113 S.Ct. at 2812 (1993) quoting *Halper*, 490 U.S. at 448; and see *Libretti v. United States*, 516 U.S. ___, 116 S.Ct. 356,363 (1995) ("heightened procedural protections to imposition of criminal forfeiture as punishment . . . cannot alter the simple fact that forfeiture is precisely that: punishment"). The factual predicates of forfeiture are not the functional equivalent of the "elements of an offense"[6]; forfeiture is merely the imposition of a punishment and does not stand as an offense unto itself.

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the Constitution." *Ex parte Lange*, 85 U.S. at 173 (1873).

[6] The need for fact-finding at the punishment phase is well established: mail fraud prosecutions do not require a finding of victim loss, *United States v. Copple*, 24 F.3d 535, 544 (3d Cir. 1993) (Becker, J.), whereas the fact of victim loss must be proven before the sentencing court may impose restitution as a component of the sentence. Thus, predicates to punishment are not co-equal to the (predicate) elements of conviction, any more than *in rem* forfeitures are co-equal to their corollary offenses.

As a consequence, this Court has never applied the *Blockburger* "same elements" test to civil penalties, but has consistently examined whether the offense underpinning the civil penalty was the same as gave rise to the prosecution. See *Blockburger v. United States*, 284 U.S. 299 (1932); *United States v. Halper*, 490 U.S. 435 (1989); *Dept. of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937 (1994). A *Blockburger* side-by-side elements comparison would be immaterial; the question is merely whether the forfeitures were sought for the same offense as the prosecution.

Respondents meet this test. The central justification for the government's forfeitures was predicated on respondents' commission of the offenses for which they were already serving life in prison. The forfeiture proceedings brought against respondents constituted punishment for the same offense because the government had incorporated the corollary criminal offenses into its summary judgment motion. Resp. Arlt's Br. in Opp.1a-29a.

Even if forfeiture is an offense in its own right, as the government argues, the *Blockburger* test would be met in this case. The forfeiture statutes wholly subsume the substantive criminal offenses set forth in Title 21 and the money laundering statutes; what is more, the government's forfeiture claims against Arlt's and Wren's property wholly subsume the respondents' previous criminal convictions. Under either *Libretti* or *Blockburger*, the government's campaign to forfeit respondents' property was an attempt to inflict a second punishment for the same offenses for which respondents were previously prosecuted.

ARGUMENT

THE *IN REM* FORFEITURE OF RESPONDENTS' PROPERTY PUNISHED THEM A SECOND TIME FOR THE SAME OFFENSE IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE

A. The *In Rem* Forfeiture of Property Including Drug Proceeds Pursuant to 21 U.S.C § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) Constitutes Punishment Under the Double Jeopardy Clause.

In its successful motion for summary judgment in the *in rem* forfeiture proceeding, the government advanced several theories. Principally, the government contended that the named property represented proceeds under 21 U.S.C. § 881(a)(6). The district court granted summary judgment, albeit for a number of reasons having little to do with proceeds *simpliciter*. (See Section 3, *post*); Pet. App. 75a-77a. For the following reasons the court of appeals correctly held that, even assuming the property was properly found to be proceeds, its forfeiture constituted a prohibited second punishment of the respondents for the same methamphetamine and money laundering offenses for which they were already serving life sentences.

1. The holdings in *Halper* and *Austin* were harmonious and demonstrate that the forfeitures in this case were punishment.

The forfeitures against respondents Wren and Arlt constituted punishment for the same reasons that led this court to hold that civil penalties and administrative taxes could be punishment. The forfeitures here cannot be distinguished, for the purposes of Double Jeopardy analysis, from the punitive effects of the sanctions imposed in *Halper* and *Austin*.

Halper teaches the following: when Congress intends that a civil statutory scheme be solely remedial and damages in fact bear a rational relationship to the government's actual loss, then the Government is entitled to "rough remedial justice or compensation" such as "reasonable liquidated damages." The result does not offend double jeopardy because it does not

amount to "punishment." *Halper*, 409 U.S. at 446.

On the other hand, a civil remedy which "authoriz[es] a supposedly remedial sanction" — but which do not roughly approximate the government's damages and costs — are punishment and may offend double jeopardy. *Halper*, 490 U.S. at 446.

Within the contours of that broad analytical framework, *Halper* stands for the proposition that a statutory penalty which Congress intended to be punitive, or which cannot be justified for solely non-punitive purposes, is punishment for double jeopardy purposes.

> Simply put, a civil as well as criminal sanction constitutes punishment when the sanction as applied in individual cases serves the goal of punishment.
>
> These goals are familiar. We have recognized in another context that punishment serves the twin aims of retribution and deterrence. See *e.g.*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963)(these are the 'traditional aims of punishment'). Furthermore, '[r]etribution and deterrence are not legitimate nonpunitive governmental objectives.' *Bell v. Wolfish*, 441 U.S. 520, 539 n. 20 (1979). From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

Halper, 490 U.S. at 448.

Subsequently, in *Austin v. United States*, this Court utilized the *Halper* Double Jeopardy test to examine an Excessive Fines challenge and applied the test to civil forfeiture proceedings under 21 U.S.C. § 881(a)(4) and (a)(7). *Austin*, 113 S.Ct. at 2806. The Court held that the value of property forfeitable under those sections varies so "dramatically that any relationship between the government's actual costs and the amount of the

sanction is merely coincidental." *Id.* at 2812 n. 14. See also *Kurth Ranch*, 114 S.Ct. 1937 (1994) (focusing on the goals of the tax statute as a whole). Thus, *Austin* obviated the necessity of an accounting of the government's damages. Instead it relied on a three-prong approach to determine that civil *in rem* forfeitures categorically constitute punishment.

In *Austin*, this Court unanimously concluded that forfeitures under 21 U.S.C. § 881(a)(4) and (a)(7) are properly considered punishment for three reasons. First, nothing in those sections contradicts the historical understanding of forfeiture as imposing punishment. Second, those civil *in rem* forfeiture statutes focus on the owner's culpability by providing for a "innocent owner defense" and by tying forfeitures directly to the commission of a drug offense. Third, Congress understood those civil *in rem* forfeitures to serve the dual punitive goal of deterrence and punishment. *Austin*, 113 S.Ct. at 2810-11.

As a result of this Court's determination in *Austin*, there is no need for a further *Halper* inquiry regarding whether civil *in rem* forfeitures under 21 U.S.C. § 881(a)(4) and (a)(7) constitute punishment. To suggest otherwise simply argues, without the courage to say so, that the Court's opinion in *Austin* was wrong.

The government raises numerous concerns regarding this court's prior holdings in *Halper* and *Austin*, none of which find support in the language of the opinions or in the principles espoused in those cases.[7] The government boldly suggests that

[7]For example, petitioner and one *amicus* argue that *Halper* would be better understood as an Excessive Fines case. Br. for Amicus 39 Counties. The notion springs from *Halper's* use of proportionality, which petitioner and amicus treat, without differentiation, as the equivalent of the Excessive Fine test. In *Halper,* proportionality refers to whether an otherwise remedial sanction serves rough justice, that is, whether a sanction's disproportionality rises to a level where it can be said to punish. The fact that a sanction is punishment, however, is distinct from whether it *necessarily* exceeds the Excessive Fines Clause. Pet. 15a, n. 8 and text. Similarly, *Kurth Ranch* shows that a second

there exists some tension between the "categorical" language in *Austin*, and the "case-by-case" approach adopted in *Halper*,; Pet. Br. 41. No such tension exists between these unanimous decisions.

The government's request that this Court disregard the *Austin* analysis to the Double Jeopardy Clause — and its suggestion, Pet. Br. 41, that such an application would defeat the *Halper* case-by-case approach — makes no sense. There is no contradiction between these two approaches. *Halper* mandates that all civil sanctions be examined to determine whether they serve retributive or deterrent purposes. *Halper*, 490 U.S. at 448. If that civil sanction does serve a retributive or deterrent purpose, as opposed to solely serving a remedial purpose, it is punishment for purposes of the double jeopardy clause. *Id. Austin* followed exactly what this Court previously mandated in *Halper*. Indeed, the *Austin* decision was based specifically on that prior holding.

> We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained as serving in part to punish. We said in *Halper* that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. 490 U.S. at 448, 109 S.Ct. at 1902.

Austin, 113 S.Ct. at 2806.

Therefore, *Austin* forecloses any further inquiry regarding civil *in rem* forfeitures under 21 U.S.C. § 881(a)(4) and (a)(7) in determining whether or not those sections constitute punishment. They do; what is more, the government has advanced no credible argument to support a wholesale rejection and overruling of this Court's recent unanimous holdings.

punishment that is not excessive can nevertheless offend double jeopardy. *Kurth Ranch*, 114 S.Ct. at 1946-47 (tax rate's size did not render tax punitive).

The government's brief expresses fear that the extension of *Austin's* formulation to other contexts could cast unwarranted doubt on the constitutionality of practices that have long been thought entirely proper. Pet. Br. 41. The concern is illusory. *Austin* focused on one statutory scheme, civil *in rem* forfeitures pursuant to 21 U.S.C. § 881. That its rationale may extend to other contexts is no reason to deny its compelling analysis. Even so, the government's fears are unfounded. Numerous civil sanctions have been determined to serve solely remedial goals. This Court has upheld fines and penalties based on the intent of Congress to formulate a remedial statute. Congress intended that these civil actions be solely remedial: *Helvering v. Mitchell*, 303 U.S. 391(1938), (tax deficiency and penalty based on tax loss and investigatory costs); *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (*qui tam* recovery under 31 U.S.C. 3730(b) where the actual cost to the government roughly equaled the damages recovered); see *Halper*, 490 U.S. at 444, 445–46; *Rex Trailer Company v. United States*, 350 U.S. 148 (1956) (recovery of a specific related loss as to five surplus vehicles); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972) (liquidated damage provisions of customs forfeiture statutes were intended to be solely remedial); and *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984) (illegal firearms).[8]

There is nothing inconsistent between this Court's prior decisions and its determinations in *Halper* and *Austin*. See *Austin*, 113 S.Ct. at 2804 n. 4. Therefore, the government's concern that the application of *Austin* to double jeopardy would cast unwarranted doubt on the constitutionality of practices that

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[8] *Amici*, too, sound the alarm but no more convincingly than the government. The prevalent practice of summarily suspending the licenses of drivers susptected of operating a motor vehicle while under the influence has been held to be sufficiently remedial so as to not implicate punishment nor double jeopardy concerns. Br. of MADD at 12-14. The use of equitable abatement, likewise, does not implicate punishment. *Bennis*, ___U.S. ___, 1996 WL 88269, No. 94-8729 (March 4, 1996) (Ginsburg, J.).

have long been thought proper is ill-founded. Before any civil fine or penalty can be held to be punitive to the extent that it implicates the Double Jeopardy Clause of the Fifth Amendment or constitutes punishment in any constitutional respect, it must continue to be examined in light of both *Halper* and *Austin*. *Austin* has simply foreclosed that inquiry as to civil *in rem* forfeitures pursuant to § 881(a)(4) and (a)(7), and rightly so.

The government also suggests that "[t]he extension of *Austin's* reasoning...to the double jeopardy setting "would lead to increased litigation about matters unrelated to the basic concerns of the relevant constitutional provision, and likely would ultimately prove unworkable." Pet. Br. 41.

This parade of horribles reflects a disingenuous disregard of the tremendous power the Government continues to wield under the criminal forfeiture statutes to obtain the same results it improperly sought in these civil proceedings. The anarchy suggested by the Government is pure puffery. Not only does the Government have the option of seeking both criminal prosecution and forfeiture in the same proceeding pursuant to 21 U.S.C. § 853(a)(2) and 18 U.S.C. § 982, but the Government may proceed with civil *in rem* forfeiture actions in the absence of a related criminal prosecution.[9] As a matter of fact, that may be the preferred process.

> Where the issues related to civil forfeiture are the same as or closely related to those that will arise in the prosecution of a drug offense, it is a waste of valuable judicial and prosecutive resources to require separate civil forfeiture proceedings . . . thus, a more efficient

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[9] The Government raises an interesting but false concern, that the "nuisance" of a crack–infested tenement could not be abated without having the civil forfeiture confer upon its fugitive owner a form of immunity. Pet. Br. 57 n.17. Forfeiting a nuisance is a remedial act whose sanction (unlike *Halper's* or Respondents) could, under the proper statutory language, be entirely justified by its remedial goals. In any event, this Court has rejected the notion that an equitable abatement of a nuisance would be deemed a punishment, *Bennis*, ___ U.S. ___, 1996 WL at 88269.

> mechanism for achieving the forfeiture of a defendant's proceeds from his drug trafficking or of other property he has used in the offense is to permit the criminal forfeiture of such property and thereby consolidate the forfeiture action with the criminal prosecution. [21 U.S.C. § 853] creates such a mechanism. S. Rep. No. 225, 98 Cong., 2d Sess. 210, reprinted in 1984 U.S. Code Cong. Admin. News 3182, 3393.

United States v. Littlefield, 821 F.2d 1365, 1367–68 (9th Cir. 1987). Thus, there is no bar to the government proceeding by way of criminal forfeiture which serves as the efficient alternative to civil forfeiture just as Congress intended. See also *United States v. Smith*, 966 F.2d 1045 (6th Cir. 1992).[10]

The government routinely includes forfeiture counts in its criminal indictments, see *Libretti*; *Alexander v. United States*, 509 U.S. 544 (1993), and, as the government itself points out, Pet. Br. 54, there is no double jeopardy bar to seeking multiple punishments in a single proceeding. See *e.g.*, *Missouri v. Hunter*, 459 U.S. 359, 368–69 (1983).[11]

3. *Halper* and *Austin* apply to proceeds.

The government contends that, even if civil forfeiture under other portions of 21 U.S.C. § 881(a) constitutes punishment, at least in part, a special dispensation from the scope of the Double Jeopardy Clause should be granted. This grant should benefit not all property forfeitable under § 881(a)(6), but only a single

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[10] Although the Government only addresses 18 U.S.C. § 981 issues in its *Blockburger* argument, Pet. Br. 51, and appears to have otherwise abandoned argument with respect to this statute, there are criminal forfeiture provisions under the Money Laundering Statute, 18 U.S.C. § 982, analogous to criminal forfeitures under 21 U.S.C. § 853, that incorporate the same procedures provided for in 21 U.S.C. § 853. See *United States v. Ripinsky*, 20 F.3d 359 (9th Cir. 1994).

[11] As *amicus* suggests, criminal forfeitures are not only more fair than their civil counterparts, they are also more efficient than bringing separate civil proceedings. Br. NACDL 22.

type of property described in one phrase in § 881(a)(6) as "all proceeds traceable" to an exchange for a controlled substance. 21 U.S.C. § 881(a)(6). Although the government devotes only three pages of its brief to this contention, Pet. Br. 48-50, this is a refrain which has become popular among courts seeking to avoid the application of *Halper* and *Austin* to the government's increasing use of dual criminal and civil forfeiture proceedings. See *United States v. Tilley*, 18 F.3d 295 (5th Cir.), cert. denied, 115 S.Ct. 573 (1994); *United States v. Salinas*, 65 F.3d 551 (6th Cir. 1995) (following *Tilley*); *United States v. Smith*, 76 F.3d 879 (7th Cir. 1996) (same). It is important, therefore, to give careful attention to what this purported exception to double jeopardy protection entails and to determine if it is justified.

Some courts, including those noted above, have been reluctant to enforce double jeopardy protections when faced with strong proof, or even outright admissions, of illegal drug activity. After all, we all live in the midst of a national "War on Drugs."

> We are not unsympathetic to the government's strong desire to eradicate drug trafficking: * * * We must not forget, however, that at the core of this system lies the Constitution, with its guarantees of individuals' rights. We cannot permit these rights to become fatalities of the government's war on drugs

United States v. $38,000 in United States Currency, 816 F.2d 1538, 1548-49 (11th Cir. 1987). Once the Fifth Circuit erroneously declared in *Tilley* that the forfeiture of drug proceeds "will always be directly proportional to the amount of drugs sold," *Tilley*, 18 F.3d at 300, and therefore, arguably purely remedial, the temptation was great to disallow double jeopardy claims on this basis. The government has been quick to assert "proceeds" as a talisman in place of analysis to avoid double jeopardy's bar to further punishment. Thus, in one case, a court has applied the "proceeds" shield to a double jeopardy claim, based on no more than the appearance in the government's pleadings of a "proceeds" theory of forfeiture, wholly unsupported by any evidence. See *Salinas*, 65 F.3d at

553-54 & n. 1.[12]

Yet, as this court has observed, the notion of punishment cuts across the application of simple labels, and courts "must follow the notion where it leads." *Halper*, 490 U.S. at 448. And the prohibition of second punishments is "within the contemplation of a constitutional protection that has 'deep roots in our history and jurisprudence.'" *Kurth Ranch*, 114 S.Ct. at 1948, (quoting *Halper*, 490 U.S. at 440). Those who drafted and adopted the Fifth Amendment certainly understood that its application would benefit those who had engaged in criminal conduct and had been convicted of serious offenses.

Since the decision in *Halper*, the government has continued to vigorously pursue dual criminal and civil forfeiture actions, ignoring that neutral, common sense analysis would find punitive aspects in all forfeitures under 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A). In the face of direct warnings from the courts and legal writers, the government sought refuge behind legal fictions and superficial labels. See *e.g.*, *United States v. Michelle's Lounge*, 39 F.3d 684, 696 (7th Cir. 1994) ("The use of parallel proceedings (cites ommitted) a civil forfeiture to restrain assets and obtain discovery, followed by a criminal indictment that stays the civil case [cite omitted] sometimes sets these two regimes

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12 The *Salinas* court stated: "The forfeiture proceeding was based on the *theory* that the car was proceeds because it was purchased with drug money, Salinas' only source of income. Since Salinas failed to contest the proceeding in any way, he is estopped from now challenging the theory under which the vehicle was forfeited." *Salinas,* 65 F.3d at 553, n. 1 (emphasis added). No authority was given for such a novel application of estoppel. In his concurrence, Judge Wellford forthrightly admitted: "*Tilley* presents several problems in application. * * * [I]f the government had sought forfeiture of Salinas' automobile on the grounds that he used the car to carry narcotics from Texas to Michigan, [the Sixth Circuit's prior decision in] *Ursery* [59 F.3d 558 (1995)] might have barred this criminal prosecution. Thus, after *Ursery* and our decision today, double jeopardy protection will often depend on which theory the government utilizes to justify the civil forfeiture." *Id.* at 554.

on a collision course"); T. Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. Miami L. Rev. 911 (1991) (legal fiction that forfeiture is an action against a "guilty" *res*, not the property owner, obscures the punitive aspects of forfeiture). Now the government attempts to use the new label of "proceeds" to avoid constitutional prohibitions. Yet even the most strict view of double jeopardy protections acknowledges that the forfeiture of currency (or other non contraband) is a "taking of lawful property" which "must be considered, in whole or in part, punitive." *Austin*, 113 S.Ct. at 2813 (Scalia, J., concurring in part and in the judgment).

As the following analysis shows, no sound basis exists for applying the Double Jeopardy Clause differently to alleged proceeds than other types of forfeitable property.

The statutory scheme treats "proceeds" in exactly the same manner as other types of property subject to forfeiture. Thus, a conveyance used to facilitate drug transportation, § 881(a)(4); real property used to facilitate drug transactions, § 881(a)(7); money furnished in payment for drugs; § 881(a)(6), money intended to be used to facilitate drug activity, § 881(a)(6); and proceeds traceable to a drug exchange, § 881(a)(6); all are subject to § 881(a) as property that "shall be subject to forfeiture to the United States and no property right shall exist in them." 21 U.S.C. § 881(a)[13].

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13 21 U.S.C. § 881(a)(6) provides:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

* * *

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to

As the lower court made clear, 21 U.S.C. § 881(a)(6) encompasses more than profits or proceeds. "Rather than rendering only the *profits* of drug dealers subject to forfeiture, the statute applies to nearly any money that is involved in a narcotics transaction in some fashion." Pet. App. 20a-21a.

The analysis in *Austin* which concluded that § 881(a)(4) and (a)(7) were at least in part punitive in nature applies with equal force to § 881(a)(6) categories of property. § 881(a)(6) contains an "innocent owner" defense which is identical to that contained in § 881(a)(7). Thus, both provisions focus "on the culpability of the owner in a way that makes them look more like punishment, not loss." *Austin*, 113 S.Ct. at 2811.[14] All three subsections "tie forfeiture directly to the commission of drug offenses." *Id.* And the legislative history of § 881 related in *Austin, id.*, confirms that the types of property described in 881(a)(6), including proceeds, were just as surely a product of congressional intent to advance the punishment and deterrence of the drug trade as was subsection (a)(7). See *United States v. 9844 South Titan Court*, 75 F.3d 1470 (10th Cir. 1996) (noting that the government "suggests no reason to treat [§ 881(a)(6)]

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have been committed or omitted without the knowledge or consent of that owner.

The statute makes no distinction among these types of property. See *Kurth Ranch*, 114 S.Ct. at 1946 ("forfeitures are readily characterized as sanctions").

[14] In *Bennis v. Michigan*, ___ U.S. ___, 1996 WL 88269 (March 4, 1996), this Court revisited the *Austin* analysis of the significance of the statutory "innocent owner" defense.

> In *Austin*, the Court held that because "forfeiture serves, at least in part, to punish the owner," forfeiture proceedings are subject to the limitations of the Eighth Amendment's prohibition against excessive fines. 509 U.S. at __, 113 S.Ct. at 2810. There was no occasion in that case to deal with the validity of the "innocent-owner defense," other than to point out that if a forfeiture statute allows such a defense, the defense is additional evidence that the statute itself is "punitive" in motive. *Id.*, [ ] 113 S.Ct. at 2809-2810.

___ U.S. ___, 1996 WL 88269, at *6 (emphasis added).

differently in terms of its intent, effect, or legislative history").

The government notes that the forfeiture of proceeds is "a recent development in forfeiture law." Pet. Br. 48. Its recent inclusion in the language of § 881(a), however, has no bearing on whether it is intended to be punitive. Indeed, this Court observed in *92 Buena Vista Avenue* that the 1978 amendment authorizing the forfeiture of drug proceeds marked "an important expansion of government power." *United States v. 92 Buena Vista Avenue* , 507 U.S. 111, 121 (1993). As *Austin* noted, the punitive purpose which prompted congressional action in 1978 had not waned with the amendments of 1984. *Austin*, 113 S.Ct. at 2811 (citing Joint House-Senate Explanation of Senate Amendment to Titles II and III of the Psychotropic Substances Act of 1978, 124 Cong. Rec. 34671 (1978) (noting "the penal nature of forfeiture statutes")).[15]

For example, *Austin's* historical determination was not affected by the fact that prior customs laws, piracy laws, and revenue laws themselves contained no innocent owner defense. Indeed, like the proceeds provisions, that defense is a recent statutory creation that supports the conclusion that the statutes are punitive. *92 Buena Vista Avenue*, 507 U.S. at 122-123. Thus, despite their recent vintage, this Court found that forfeitures under § 881(a)(4) and (a)(7) were punishment, even though "[u]nlike traditional forfeiture statutes, § 881(a)(4) and (a)(7) expressly provide for an 'innocent owner' defense." *Austin*, 113 S.Ct. at 2810; see also *Bennis*, ___ U.S. ___, 1996 WL 88269, at *6. Significantly, it is the very fact that the forfeiture statutes in this case do not have a traditional remedial

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[15] Congress clearly had punishment in mind when, in 1978, it added subsection (a)(6) to § 881. The legislative gloss noted that "due to the penal nature of forfeiture stautes," property should only be forfeited if there is a "substantial connection between the property and the underlying criminal activity." 124 Cong. Rec. 34,661 (1978). Congress intended forfeitures pursuant to § 881(a)(6) to constitute punishment, and under the *Austin* three-part analysis, there exists no reason whatsoever to distinguish § 881(a)(6) from (a)(4) and (a)(7).

pedigree, but have origins in congressional action seeking to enhance drug penalties, that their punitive purpose is revealed. No remedial objectives are mentioned anywhere in the legislative history of the Comprehensive Drug Abuse and Prevention Control Act of 1970, nor in the amendments to that act which are at issue here. Largely because of the contemporary genesis of these forfeiture provisions, there is no question that forfeitures under 21 U.S.C. § 881(a)(6) and under 18 U.S.C. § 981(a)(1)(A) are properly considered punishment.

3. Forfeiture under 18 U.S.C. § 981 also involves punishment.

The government's motion for summary judgment was also based on an application of 18 U.S.C. § 981(a)(1)(A) which provides for forfeiture of property involved in various currency and money laundering violations.[16]

In this Court, the government has offered no analysis and has apparently abandoned all argument with respect to § 981.[17] The government's abandonment is proper. As applied to the double jeopardy analysis of civil punishment, however, the statute functions virtually identically with the analogous § 881 forfeiture statute.

The term "proceeds" does not appear anywhere in § 981(a)(1)(A). The sweep of § 981 is extremely broad, including any property "involved in" an illegal money laundering

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16 18 U.S.C. § 981(a)(1) provides in part:

(a)(1) Except as provided in paragraph (2), the following property is subject to forfeiture in the United States:

(A) Any property, involved in a transaction in violation of section 5313(a) or 5324 of title 31, or of section 1956 or 1957 of this title, or any property traceable to such property. However, no property shall be seized or forfeited in the case of a violation of section 5313(a) of title 31 by a domestic financial institution regulated by the Securities and Exchange Commission or a partner, director, or employee thereof.

17 Except as to the "same offense" test under the government's *Blockburger* theory, see part C, *post*.

transaction. Indeed, the government argued to the Ninth Circuit against any limitation of § 981(a)(1)(A) to proceeds. Pet. App. 21a. Such a limitation, the government argued, would undermine the purpose of the forfeiture statutes because money laundering largely depends upon the use of legitimate monies to advance or facilitate a money laundering scheme and the government sought these monies as well as ill-gotten proceeds. The government's position has historically been that forfeitures under § 981(a)(1)(A) are expressly not limited to proceeds. Pet. App. 21a and n. 12, Government's Memorandum of Contentions of Fact and Law.

4. This case does not involve only proceeds and cannot be decided solely upon an analysis of proceeds forfeiture.

Although the government's brief argues that the property in $405,089 represents proceeds, the government cannot fairly "claim that this case involved *only* the forfeiture of illegal proceeds." Pet. App. 21a (emphasis in original). Indeed, the government implicitly concedes this in its brief: "The district court in [this] case granted summary judgment...on the ground, *among others*, that the assets at issue were 'proceeds' of narcotics trafficking." Pet. Br. 48 (emphasis added). The district court granted summary judgment in favor of the government in a terse one sentence order encompassing all of the defendant properties and accepting all of the government's arguments. Pet. App. 76a and 77a. That court's order was not based on a proceeds theory. The government's summary judgment motion, in fact, sought forfeiture for significant non-proceeds reasons, including that there were "financial transactions designed to conceal the location, source, or the ownership of defendant properties," Pet. App. 68a, there was property "used to 'facilitate' illegal money laundering" pursuant to 18 U.S.C. § 981(a)(1), Pet. App. 70a–71a, and that legitimately obtained funds, to the extent they were commingled with forfeitable funds, were forfeitable. Pet. App. 71a.

In opposition, respondents Arlt and Wren vigorously

disputed the government's alleged "uncontroverted" facts, showing that for every cash transaction requiring it, they had filed a proper Currency Transaction Report (CTR) and IRS 1099 forms, Resp. Arlt's Br. in Opp. 43a, that all cash transactions were legal in themselves, and that all of respondents' properties had been acquired in a legal manner with lawful funds. Resp. Arlt's Br. in Opp. 31a–52a. The district court's ruling did not discuss why it rejected these arguments, but it is clear from the foregoing that the order was not based solely on a "proceeds" theory.

5. Proceeds are not "contraband" and their forfeiture is not solely remedial.

United States v. Tilley and those cases following it adopt the view that the forfeiture of drug "proceeds" is, by definition, purely remedial, and therefore outside the scope of the Double Jeopardy Clause. *Tilley*, 18 F.3d at 298-99. Close analysis reveals, however, that Tilley and its progeny are based upon seriously flawed reasoning and are unfaithful to the principles of *Halper* and *Austin*.[18]

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[18] Not only does *Tilley* contradict it's own prior decision in *Wood v. United States*, 863 F.2d 417, 421 (5th Cir. 1981) (holding that § 881(a)(6) forfeitures cannot seriously be considered anything other than punishment), but the same Fifth Circuit later conceeded that the *Austin* court specifically eliminated the necessity of the *Halper* case-by-case approach in the forfeiture setting and that the logic of *Austin* applies to the Double Jeopardy Clause. *United States v. Perez*, 70 F.3d 345, 349 (5th Cir. 1995). Thus, the Fifth Circuit stands in the anomalous position of conceeding the *Austin* categorical approach that § 881(a)(4) and § 881(a)(7) civil forfeitures constitute punishment not only for Eighth Amendment purposes, but also for Fifth Amendment Double Jeopardy purposes, yet holding that § 881(a)(6) forfeitures are "distinctly different". *Id.* 349. And, of course, given the broad language of § 881(a)(6), what the Fifth Circuit must really have meant is that *most* § 881(a)(6) forfeitures constitute punishment for double jeopardy pusposes, but only those which are proven to be the type of forfeitures described by one word in the statute — proceeds — are not afforded the same double jeopardy protection. There is no principled way to support such an argument.

Tilley first asserted that the forfeiture of proceeds was solely remedial because it was repayment for the social cost of the illegal activity and the cost of investigating and prosecuting the criminal conduct. *Id.* The underpinnings of this proposition are built upon shifting sand. If forfeiture is meant to repay all of society's costs of drug abuse, it necessarily follows that the individual property owner is required to pay for the acts of third parties for which he is not directly responsible, much less able to control. That suddenly sounds very much like punishment; and it also fits very neatly within the definition of constituting "payment to a sovereign as punishment for some offense," i.e. a penalty, not something purely remedial. *Browning-Ferris Industries v. Kelso Disposal, Inc.*, 492 U.S. 257, 265 (1989). The government did not attempt to show in the court below, nor does it now claim, that the forfeiture in this case "approximates the cost of investigating, apprehending, and prosecuting" the respondents, or "that it roughly relates to any actual damages that they caused" the government. *Kurth Ranch*, 114 S.Ct. at 1948. This Court, in dealing with *in rem* civil forfeitures, has already rejected the "repayment to society" rationalization, holding that the value of the properly forfeited under those sections varies so dramatically that any relationship between the government's actual costs and the amount of the sanction is merely coincidental. *Austin*, 113 S.Ct. at 2812, n. 14.

Additionally, as the Tenth Circuit noted in rejecting *Tilley's* analysis:

> The difficulty with the "repayment to society" argument is that it applies as readily to all § 881 forfeitures as it does to the forfeiture of drug proceeds. If the "remedy" effected by forfeiture is understood broadly enough to encompass not only direct governmental losses, ... but also the nearly incalculable "social costs" of an entire class of legal conduct, then all forfeitures are purely remedial. This conclusion is inconsistent with the Supreme Court's analysis in *Austin*.

Titan Court, 75 F.3d 1470, 1485 (1996).

Tilley's second claim is that "the forfeiting party loses

nothing to which the law ever entitled him." *Tilley*, 18 F.3d at 300. It is suggested that forfeiting drug proceeds is analogous to seizing stolen money from a bank robber "who is arrested as he exits the bank." Pet. Br. 48. See *United States v. Smith*, 76 F.3d 879, (7th Cir. 1996); citing *Tilley*, 18 F.3d at 300.

The problem with the bank robbery analogy is that restitution to the bank, the lawful owner of the stolen money, is totally different from requiring payment (i.e., forfeiture) "to a sovereign ... for some offense." *Browning-Ferris Industries*, 492 U.S. at 265. The bank robber has no right to possess or pass good title to money stolen from a bank. Restatement 2nd of Torts, § 871 (1977). The Fifth Circuit asserted in *Tilley* that "the forfeiting party loses nothing to which the law ever entitled him." *Tilley*, 18 F.3d at 300. Yet, as the Tenth Circuit observed in *Titan Court*:

> *Tilley* does not state, and we do not find, any class authority for the proposition that legal ownership of drug proceeds is impossible. In fact, drug proceeds are ownable by anyone who can establish an innocent owner defense. *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 128, 113 S.Ct. 1126, 1137,122 L. Ed. 2d 469 (1993). Thus, even a noninnocent possessor of such proceeds must own them insofar as he can alienate them. We must conclude that the proposition that drug proceeds may not be owned is false as a statement of law.

Titan Court, 75 F.3d at 1485-86.

The government's attempt to also characterize forfeitures under 21 U.S.C. § 881(a)(6) as contraband is a rehash of the same argument rejected by this Court in *Austin*.

> Concededly, we have recognized that the forfeiture of contraband itself may be characterized as remedial because it removes dangerous or illegal items from society. See *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364, 104 S.Ct. 1099, 1105

> (1984). The Court however, previously has rejected the government's attempt to extend that reasoning to conveyances used to transport illegal liquor. The same, without question, is true of the properties involved here.

113 S.Ct. at 2811. Contraband cannot be created by judicial fiat, but only by legislative action. See *Trupiano v. United States*, 334 U.S. 699 (1948). This Court has consistently rejected the characterization of conveyances or instrumentalities as contraband. See *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965) ("there is nothing even remotely criminal in possessing an automobile"); see also *Austin*, 113 S.Ct. at 2811 (citing *One 1958 Plymouth Sedan).*

Although the forfeiture of clearly-defined contraband is remedial because it removes dangerous or illegal items from society, the same is not true as to property described in 21 U.S.C. § 881(a)(6) or 18 U.S.C. § 981(a)(1)(A). None of those properties are dangerous in-and-of-themselves nor illegal in-and-of-themselves. Characterizing them as contraband or "the functional equivalents of contraband", Pet. Br. 50, expands that concept far beyond its historical meaning. Money, or other property, which represents proceeds of some criminal activity or which represents the investments of alleged proceeds does not become contraband simply because of its origin. To adopt such a rule would be devastating, a concern recently expressed by Justice Stevens in his dissent in *Bennis v. Michigan*, ___ U.S. ___, 1996 W.L. 88269 *14, n.1.

From that perspective, it is clear that 21. U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) property is not contraband, since the statue gives the legal right to anyone to own such property subject to forfeiture, including proceeds. This right of ownership is *substantial*, allowing a possessor or owner of forfeitable property to alienate their interests to either a *bona fide* purchaser or a donee. *92 Buena Vista Avenue,* 113 S.Ct. at 1137. This property right to forfeitable property is greater than the right of one who might obtain property through fraud, where

such a person has a voidable title but can pass good title only to a bona fide purchaser for value. Restatement (2nd) of Contracts § 163 (1979); *Langley v. FDIC*, 484 U.S. 86, 93-94 (1987). Thus the argument that a possessor or owner of drug proceeds has no property right in such "contraband" is false as a matter of law.

Consider, for example, a person taking a $10,000 bank loan in order, surreptitiously, to finance the purchase of cocaine on the wholesale market. The intention is to sell the drugs at retail, anticipating $15,000 in gross receipts. This initial $10,000 is not contraband, though it is subject to forfeiture under § 881(a)(6). It is equally in error to contend that title to the currency vested in the government upon the intention to use the loan or even upon the commission of the drug transaction itself. Despite the language in § 881(a) that "no property right shall exist" in the types of property described in (a)(1) through (a)(7), the government must first obtain the forfeiture before all rights are extinguished. The government advanced its relation back "no property right" argument in *92 Buena Vista Avenue*, where this Court rejected it out of hand.

> [The government] contends that [respondent] never had been the owner of this parcel of land because the statute vested ownership in the United States at the moment when the *proceeds* of an illegal drug transaction were used to pay the purchase price. In support of its position, the Government relies on both the text of the 1984 amendment to the statute, and the common law relation back doctrine. We conclude, however, that neither the amendment nor the common law rule make the Government an owner of property *before* forfeiture has been decreed.

92 Buena Vista Avenue, 507 U.S. at 123-124 (emphasis added). As *92 Buena Vista* made clear: "Until the Government does win such a judgment [of forfeiture], ... someone else owns the property." *92 Beuna Vista Ave.*, 507 U.S. at 126, 132-135 (Scalia, J., joined by Thomas J., concurring in the judgment)

(title vests in the government if forfeiture is decreed). Otherwise, the innocent owner defense is rendered meaningless.

7. Forfeiture of proceeds is not a disgorgement of unjust riches but deprives the defendant of property rights in excess of illicit profits.

As shown in the previous section, *Tilley* and its progeny place great weight in the contention that "the forfeiting party loses nothing to which the law ever entitled him." *Tilley*, 18 F.3d at 300, citing *Rex Trailer Co. v. United States*, 350 U.S. 148, 153-54 & n.6 (1956) (explaining that the civil sanction imposed there might avoid unjust enrichment). The *Tilley* court, however, misses the point. *Rex Trailer* involved a scheme to defraud the government at the expense of veterans whom the government intended to benefit.

> Unjust enrichment typically involves the illicit enjoyment of a benefit taken from its rightful owner. Restatement of Restitution 1 (1936). The force of the equitable analogy is diminished where, as here, there simply is no rightful owner to whom the money may be returned.

Titan Court, 75 F.3d at 1486.

In a dramatic example of misplaced reliance, the Seventh Circuit in *Smith* found support in *S.E.C. v. Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994), for its conclusion that forfeiture of proceeds is purely remedial under a disgorgement theory. *Smith*, 76 F. 3d 879, 882-83 (1996), with an argument which the government now espouses. Pet. Br. 49. This misplaced reliance underscores a central fallacy in the government's contention regarding the remedial nature of forfeiting proceeds.

In *Bilzerian* the circuit court dealt with a double jeopardy claim based upon an order, following conviction and sentencing for multiple securities laws violations, that the defendant disgorge the illicit profits of his illegal stock manipulation. *Bilzerian*, 29 F.3d at 693. Bilzerian's claim that the disgorgement order constituted double jeopardy was rejected because "the disgorgement order is remedial in nature and does

not constitute punishment within the meaning of double jeopardy." *Id.* at 698. Significantly, the court explained:

> The [district] court was careful to order disgorgement of the profits caused by Bilzerian's securities viola-tions only. For the shares purchased after his securities violations occurred, the court subtracted Bilzerian's purchase price from the price at which he later sold the stocks based on the theory that all appreciation occurring after his violations was due to his illegal actions.

Id. at 697 (emphasis added). The implication of the court's explanation is that a disgorgement order that did not go to lengths to distinguish net profits derived from illegal transactions from all other funds would constitute, at lease in part, a punitive measure.

Herein lies the rub. As one court put it: We "strongly suspect that the framers of the Double Jeopardy Clause were much more concerned about the reality of punishment than the focus of proceedings." *United States v. Aileman*, 893 F. Supp. 888, 899 (N.D. Cal. 1995). The government's view of proceeds forfeiture as devoid of any measure of loss or punishment to the property owner flies in the face of economic reality. Drug transactions are, after all, finite economic events albeit illegal. Thus, there is necessarily some investment of capital and of labor in the economic endeavor. *Bilzerian* took these factors into account, limiting the disgorgement to net profits; the courts in *Tilley*, *Smith*, or *Salinas* did not. Thus, to say that proceeds forfeiture is purely remedial is simply wrong and in contravention of economic reality.

Yet, beyond the forgoing, there is a far more subtle and sinister message contained in the government's suggestion here. It is the hope that those facing punishment and those who are threatened with the loss of their property deserve *less* constitutional protection than others. Such a proposition is the antithesis of the founding principles of this country. The Bill of Rights was enacted to protect the very same people as those now before this Court — those who stand accused and those who

stand to lose their property interests to the government. The Double Jeopardy Clause component of the Fifth Amendment stands to protect against the exact kind of sanction sought here — separate proceedings which lead to successive punishment with retributive goals for the same conduct.

For all the above reasons respondents submit that *Tilley* and those cases following it failed to apply the analysis mandated by *Austin*. Forfeiture of drug proceeds under § 881(a)(6) contains some punitive aspects, as do all forfeitures brought under § 881(a)(4), (7) or 18 U.S.C. § 981(a)(1)(A). The Double Jeopardy Clause is implicated.

B. The Government's Use of Separate Forfeiture Proceedings to Inflict "Successive Punishment" Violated Respondents' Protection Against Double Jeopardy

The court of appeals correctly determined that the two forms of punishment imposed upon the respondents in this case were necessarily imposed in separate proceedings which in fact placed the repondents twice in jeopardy.

The petitioner argues that, lacking an expectation of finality at the time of sentencing, the respondents were not separately punished by the subsequent forfeitures. This argument ignores precedent, policy, and common sense. The government has lopped off all that does not neatly fit its procrustean theory. In particular, the government ignores the very doctrine intended to prohibit the government's precise litigation strategy against respondents.

1. The criminal prosecution and civil forfeiture proceedings in this case cannot be merged into a single proceeding.

One consequence of the Constitution's bar on being "twice" placed in jeopardy is the doctrine that all punishment for a certain offense must be imposed in a single proceeding. The protection is not against multiple punishments, as such, but against

multiple punishments imposed in separate proceedings: that is, against successive punishments. If double jeopardy protects against successive punishments, what justifies the government's "coordinated prosecution" methodology in the face of double jeopardy claims? The government's answer is that the two proceedings are really only one. Pet. Br. 54.

The government's justification relies on cases where the defendant in effect consented to additional proceedings,[19] and on the theory that government "oppression of the sort against which the Double Jeopardy Clause was intended to protect" amounts to no more than an abuse of the defendant's legitimate expectation of finality. Pet. Br. 57. As the record makes clear, respondents were not the architects of the successive proceedings; the government was. The consent cases therefore do not avail the government's argument. Furthermore, the abuse protected by the Clause far exceeds mere expectations of finality, and putting the modifier "legitimate" into the calculation merely begs the question — when *can* the government be said to be done with the business of punishing?

Common sense dictates that a civil forfeiture proceeding and a criminal prosecution can *never* be the same proceeding for double jeopardy purposes. Under the government's theory, it could commence two prosecutions of the same person on the same criminal charges at on about the same time, either in two districts or before two judges of the same district, and pursue both of them to completion and sentence, without violating the Double Jeopardy Clause. First, the differences between a civil proceeding and a criminal proceeding prevent them from ever being anything but separate proceedings. As the Ninth Circuit concluded:

> We fail to see how two separate actions, one civil and one criminal, instituted at different times, tried at different times before different factfinders, presided

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[19] *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 309 (1984); *Ohio v. Johnson*, 467 U.S. 493, 500-01 (1984).

> over by different district judges, and resolved by separate judgments, constitute the same "proceeding." In ordinary legal parlance, such actions are often characterized as "parallel proceedings," but not as the "same proceeding."

Pet. App. 8a. See also *United States v. Torres*, 28 F.3d 1643 (7th Cir.), cert. denied, 115 S.Ct. 669 (1994) ("[t]wo trials, even if close in time, are still double jeopardy").

As the government correctly notes, Pet. Br. 55, the Constitution does not prohibit the government from securing the full range of authorized penalties — forfeiture and incarceration — in the same proceeding. Since 1984, the government has had available criminal forfeiture statutes that Congress designed specifically in order to allow federal prosecutors to join the penalties in one proceeding:

> [t]he problem with civil forfeiture is that even if the same facts that are at issue in a criminal trial are also dispositive of the forfeiture issue, it is still necessary for the government, in addition to the criminal case, to file a *separate* civil suit.

S. Rep. No. 225, 98th Cong., 1st Sess. 196 (1983), reprinted in 1984 U.S. Code Cong.Admin. News 3182, 3379 (emphasis added). The specific provision for criminal forfeiture under 21 U.S.C. § 853 was predicated in part upon the understanding that civil forfeitures were separate proceedings from the corollary substantive prosecutions brought by the criminal division.

2. "Expectations of finality" are an inappropriate gauge of Respondents' double jeopardy interests.

The issue of a defendant's "expectation of finality", which the government claims controls all double jeopardy concerns, arises when the government appeals a punishment — which before *Halper*, meant a *criminal* punishment. See, *e.g.*, *United States v. Caterino*, 29 F.3d 1390, 1397 (9th Cir.), cert. denied, 506 U.S. 843 (1992); *Wilmer v. Johnson*, 30 F.3d 451, 456-57 (3rd Cir.), cert. denied, ___U.S.___, 115 S.Ct. 439 (1994);

and *United States v. Greenwood*, 974 F.2d 1449, 1473-74 (5th Cir. 1992), cert. denied, 113 S.Ct. 2354 (1993). The issue is whether the defendant has a *legitimate* expectation of finality in the sentence; the answer depends upon the government's having unsuccessfully sought a specific punishment at sentencing and its having the statutory power to appeal a sentence. See *United States v. DiFrancesco*, 499 U.S. at 132 (1980) (sentences have a lesser degree of finality than acquittals; there is no expectation of finality in a sentence that the government has the statutory power to appeal); *cf. Stone v. Godbehere*, 894 F.2d 1131, 1135 (9th Cir. 1990) (defendant had a legitimate expectation of finality in his sentence because the Arizona courts had no authority to modify the sentence).

The government argues that an appeal of a criminal sentence following a criminal prosecution is analogous to a criminal prosecution followed by a civil forfeiture: an appeal is brought before an appellate panel rather than a district court trial judge; appeals are assigned a different docket number; and they are often handled by a different government attorney. The government argues that, since these differences do not render an appeal "separate" from the trial, identical differences do not render a prosecutions "separate" from a civil forfeiture.

This superficial analogy to the typical pairing of criminal prosecution and civil forfeiture cannot survive analysis.

The analogy fails to grasp that a civil forfeiture proceeding and a criminal prosecution are not the logical equivalent of a criminal trial and a subsequent appeal. An appeal is a limited continuation of the lower court proceeding, while a civil forfeiture proceeding stands in no such relation to its corollary criminal prosecution. There is simply nothing about the sequencing of trial-then-appeal that makes it the functional equivalent of the combined use of civil forfeiture proceeding coupled along with, or serially to, a criminal prosecution. The Court in *DiFrancesco* permitted the government to seek

- an increased punishment;

- upon a single verdict,
- by exercising its statutory power to appeal from a ruling that denied the government the punishment it had legitimately sought in the intial sentencing.

United States v. DiFrancesco, 449 U.S. 117 (1980).

That the defendant-respondent in a sentencing appeal has no legitimate expectation of finality sheds no light upon the circumstances facing the individual respondents here.

The false analogy aside, absence of finality does not overcome the Double Jeopardy Clause's fundamental prohibition. The "successive punishments" threatened by tandem civil forfeiture and criminal prosecution breach the battlement erected against governmental overreaching:

> The basis of the Fifth Amendment protection against double jeopardy is . . . that an accused shall not have to marshall the resources and energies necessary for his defense more than once for the same alleged criminal acts.

Abbate v. United States, 359 U.S. 187, 198-99 (1959); and see *Kurth Ranch*, 114 S.Ct. at 1941.[20]

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[20] This Court has readily recognized the double jeopardy implication of the government's use of civil penalty proceedings to extract punishment. Most recently the Court addressed the problem in *Kurth Ranch*:

> This case presents the question whether a tax on the possession of illegal drugs assessed after the state has imposed a criminal penalty for the same conduct may violate the constitutional prohibition against *successive punishments* for the same offense.

114 S.Ct. at 1941. Respondents recognize that proceedings under 21 U.S.C. § 881(a) and 18 U.S.C. § 981(a), are not "criminal proceedings" under the Sixth Amendment nor easily categorized as pervasively penal (*Kennedy/Ward*). This Court has shown, however, that double jeopardy protection is not limited to prosecutions (*Halper/Kurth Ranch*), nor does the text of the Fifth Amendment suggest that twice imposing jeopardy of punishment for the same offense is restricted to criminal prosecutions as contrasted with the Sixth Amendment.

The abuse is made more onerous by the interaction of the two litigations: each makes it more difficult for the target to defend agaisnt the other. The government's argument that there was no "ripened" expectation of finality in the criminal judgment and sentence, Pet. Br. 55, ignores this core protection of the double jeopardy clause. The inherent substantive differences between the two types of proceedings illustrates the abuse:

- the civil case proceeds on an indefinite track, while the criminal case must generally be resolved within Speedy Trial Act requirements;
- the civil case places the burden on the defendant, while the government bears the burden in the criminal case;
- according to some courts the government may rely upon hearsay in the civil case to establish its prima facie burden (probable cause), while the defendant has the right to confront accusers in the criminal case;
- the parties have virtually complete discovery in the civil case, while the criminal case is tried under minimal requirements for constitutional disclosure;
- the claimant must find and retain counsel for the civil case, while counsel can be appointed in the criminal case.

These functional differences virtually assure that the claimant/defendant will be forced to mount two separate and different defenses on two separate and different fronts.

3. The multiple punishment prong has traditionally focused on single verdict proceedings.

The Double Jeopardy Clause protects finality in the special case of multiple punishments arising from a single verdict. This special case has given rise to an entire subset of double jeopardy doctrine, most often grouped within the multiple punishment prong. The origin of the finality doctrine reveals its limited

application.

In *Ex parte Lange*, this Court held that the defendant could not be dealt sentences in excess of the statutory authority, nor could the trial court impose an additional sentence following the defendant's satisfaction of the original penalty. This second holding reveals the Court's concern regarding multiple punishment.

> The petitioner, then, having paid into court the fine imposed upon him . . . and he having also undergone five days of the one year's imprisonment, all under a valid judgment, can the court vacate that judgment entirely, and without reference to what has been done under it, impose another punishment on the prisoner *on that same verdict*? To do so is to punish him twice for the same offense. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing.

Ex parte Lange, 85 U.S. (18. Wall.) 163, 175 (emphasis added). The Court further explained that this prohibition was a consequence of the constitutional ban on multiple trials.

> For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced *on the same verdict*? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is *the punishment* that would legally follow the second conviction which is the real danger guarded against by the Constitution.

Ex parte Lange, 85 U.S. at 173 (emphasis added). Accord *United States v. DiFrancesco*, 449 U.S. 117 (1980) (government sentencing appeal is permissible over *Lange's* bar where an authorizing statute provided notice of the extended proceeding and the appeal is limited to a claim for authorized punishment sought but denied at the initial sentencing).[21]

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[21] Compare *Bozza v. United States*, 330 U.S. 160, 165–67 (1947) (no double jeopardy where fine added under mandatory statutory language; sentencing court had no authority to fail to

The fundamental purpose of the Double Jeopardy Clause is to prohibit the state — with all of its resources and power — from making repeated attempts to *punish* an individual for an alleged offense. *Green v. United States*, 355 U.S. at 187-188 (1957). As noted by this court in *Ohio v. Johnson*, 467 U.S. at 498-99 (1984), the Double Jeopardy Clause serves the corollary goal of protecting an individual from the "embarrassment, anxiety and expense" of repeated government attempts to punish. These are the "humane interests" served by the Double Jeopardy Clause's prohibition against multiple punishments. See *Halper*, 490 U.S. at 447.[22]

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include fine) with *In re: Bradley*, 318 U.S. 50 (1943) (receipt of fine terminated power of court to further impose punishment in *Lange* -type election of fine or inprisonment, even by ordering refund of fine).

22 The government argues that *Halper* was merely an extension of the *second* principle of *Ex Parte Lange*, i.e., the rule prohibiting re-sentencing once the defendant has a legitimate expectation in finality. Pet. Br. 27-28. This suggestion contradicts this Court's holding in *Halper* which was explicitly based upon the third protection addressed by the Double Jeopardy Clause and not, as the government would suggest, the protection against additions to a single sentence meted out from a single verdict.

> This court many times has held that the double jeopardy clause protects against three distinctive abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishment for the same offense. See *e.g.*, *North Carolina v. Pearce*, 395 U.S. 711, 717 [ ] (1969). The third of these protections —*the one at issue here* — has deep roots in our history and jurisprudence.

United States v. Halper, 490 U.S. at 440 (emphasis added). See also *Witte v. United States*, 515 U.S. ___, 115 S.Ct. 2199, 2204 (1995).

4. Successive punishments meted out under civil *in rem* and criminal proceedings constitutes separate proceedings under the Double Jeopardy Clause.

This Court has already reviewed a double jeopardy case involving parallel civil and criminal proceedings. In *Dept. of Revenue of Montana v. Kurth Ranch*, 114 S.Ct. 1937 (1994), this Court described a highly coordinated, overlapping set of civil and criminal proceedings against marijuana growers as "separate proceedings." These separate attempts to penalize the Kurths were condemned, correctly, as "successive punishments."

The State of Montana sought to impose a tax on illegal drugs assessed after the defendants were prosecuted in state court. This Court accepted review in order to determine whether the tax "violated the constitutional prohibition against *successive* punishments for the same offense." *Kurth*, at 1941 (emphasis added).

Kurth Ranch involved four contemporaneous proceedings: a criminal prosecution, a civil forfeiture, a civil tax assessment, and a bankruptcy proceeding. The order of events in *Kurth Ranch* is similar to that faced by the individual respondents here. In *Kurth Ranch*, the criminal case and the tax proceeding—all plainly authorized by statute—were initiated months apart but were pending at the same time — yet this Court considered the proceedings to be separate. As observed by this Court, "[t]he raid put an end to the marijuana business and gave rise to four *separate* legal proceedings." *Kurth Ranch*, 114 S. Ct. at 1942 (emphasis added). This Court further observed:

> Montana no doubt could collect its tax on the possession of marijuana, for example, if it had not previously punished the taxpayer for the same offense, or indeed, if it had assessed the tax in the *same proceeding* that resulted in his conviction.

Id. 114 S. Ct. 1945 (emphasis added). Finally, the Court noted:

> Nor does the statute require us to comment on the

> possibility of "multiple punishments" imposed in the same proceeding [citation omitted], *since it involves separate sanctions imposed in successive proceedings.*

Id. at 1947 n. 21 (emphasis added). As Judge Easterbrook observed: "[I]f as *Kurth Ranch* holds, a civil proceeding to collect a monetary penalty for crime counts as an independent "jeopardy," it does not require much imagination to see the problem. Civil and criminal proceedings are not only docketed separately but also tried separately, and under the double jeopardy clause separate trials are anathema." *United States v. Torres,* 28 F.3d 1463, 1465 (7th Cir), cert. denied, 115 S.Ct. 669 (1994).

As in *Kurth Ranch*, the proceedings here were neither filed nor resolved simultaneously. Different courts and factfinders handled each proceeding. Each proceeding afforded the parties different rights and burdens. To find that these two cases, the civil forfeiture and the criminal prosecution, were somehow part of the "same proceeding" so as to find that the government did not seek to punish the respondents "twice", contradicts the black and white facts of the case as well as common sense. *Kurth Ranch* put the question to rest in its observation that the phrase "same proceeding" means "the same proceeding that resulted in [the] conviction." *Kurth*, 114 S.Ct. at 1945.

C. Respondents' Civil Forfeitures And Criminal Prosecutions Twice Punished Them "For The Same Offense.

The government argues that the *Blockburger* "same elements" test is not met with repect to either the controlled substance or money laundering violations. Pet. Br. 50-53. Because the government's argument relies upon a false premise, its conclusions are without merit.

1. Civil *in rem* forfeitures are not themselves "offenses" *per se* but are punishments.

The government wholly miscontrues this lesson and argues

against precedent, common sense, and even syntax that "civil *in rem* forfeiture amounts to an 'offense'." Pet. Br. 50. Construing civil forfeiture as an offense, the government artfully concludes that its "elements" are not the same as — or a lesser included offense of — the substantive criminal offense, thus purpotedly overcoming the *Blockburger* test. *Blockburger,* 284 U.S. 299 (1932). The argument proceeds from false assumptions.

Halper held, without equivocation, that civil sanctions, under appropriate circumstances, were "punishment as we have come to understand the term." *United States v. Halper*, 490 U.S. 435, 448 (1989).

As we have shown above in Part A and B, *ante*, the forfeitures against Respondents Arlt and Wren in this case were *per se* punishment. Nothing in *Halper* or *Austin*, or in any other opinion issued by this Court, suggests that forfeitures could be viewed as offenses, or that the test to determine when facially civil sanctions were pervasively penal (and therefore entitling defendants to greater due process protections) had been discarded.

The government's assertion that civil forfeiture is its own offense is, in essence, an attempt to characterize the proceeding as pervasively penal pursuant to *Kennedy v. Martinez-Mendoza*, 372 U.S. 144 (1963) and *United States v. Ward,* 448 U.S. 242 (1980) yet distinct from the corollary substantive offenses in Title 21. This straw-man argument rewrites decades of this Court's guidance. Double jeopardy is offended not because the civil sanction is a separate prosecution, or a pervasively penal proceding, but because its sanction is punitive either through its disproportionality to the government's actual losses or because the sanction was aimed at deterrence and retribution *ab initio.*

2. The Court has never applied *Blockburger's* "same elements" test in the forfeiture context.

In *United States v. Halper*, a unanimous Court applied a factual test to determine whether double jeopardy was offended. *Halper,* 490 U.S. 435 (1989). The government's attempt to seek

criminal and civil penalties in separate proceedings parallels the two-front strategy used against rsespondents. The Court neatly focused on the facts of Halper's conviction and read the civil sanction as further penalty for the same offense punished in the criminal proceeding:

> Nothing in today's ruling precludes the Government from seeking the full civil penalty against a defendant who previously has not been punished for the *same conduct*, even if the civil sanction imposed is punitive. In such a case, the Double Jeopardy Clause simply is not implicated . . . In other words, the only proscription established by our ruling is that the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action *based on the same conduct.*

Halper, 490 U.S. at 450-51 (emphasis added). The analysis of "same conduct" in the case of civil penalties is entirely distinct from the analysis's brief and ill-fated application in criminal cases.[23] In the civil penalties context, as distinct from the criminal setting, *the Court is not comparing two offenses.* Rather, the Court has examined whether the defendant's acts giving rise to the civil sanction constitute the same offense as was brought in the criminal prosecution. Only one offense is present; the only task is to determine whether the civil punishment was sought for the same offense as the prosecution.

Most tellingly, *Halper's* factual evaluation was *not* challenged following *Dixon* and the re-establishment of the "same elements" test for criminal offenses.[24] The Double Jeopardy clause's "same

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23 *Grady v. Corbin*, 495 U.S. 508 (1990) (modifying *Blockburger* and announcing a "same conduct" test in multiple prosecution cases; overruled by *United States v. Dixon*, 509 U.S. 688 (1993)).

24 Respondents do not suggest that *Dixon* is in error. In the criminal setting, the *Blockburger* "same elements" test is the appropriate analysis. As we demonstrate, however, *Blockburger* does not give us the appropriate guidance when analyzsing civil sanctions and their corollary criminal offenses. The phrase "same conduct," as used in *Halper* and *Kurth Ranch,* means nothing

offense" requirement is analyzed in the civil penalty context by following two inquires, one statutory, one factual. The factual question in this case is whether the forfeiture was premised on the respondents' conviction[25]; the statutory question is whether the criminal offense is subsumed within the civil sanction. If the answer to both questions is "yes" then the two proceedings contemplate punishments for the "same offense."

Additional evidence that a factual review applies to civil penalties is found in *Kurth Ranch* where this Court applied a "same conduct" analysis to a civil penalty/tax. No member of this Court questioned the application of the "same conduct" standard in civil proceedings. The majority framed the civil action issue in *Kurth Ranch* this way:

> This case presents the question of whether a tax on the possession of illegal drugs assessed after the State has imposed a criminal penalty *for the same conduct* may violate the constitutional prohibition against successive punishments *for the same offense.*

Kurth Ranch, 114 S.Ct. at 1941 (1994) (emphasis added). Thus the government's argument that the "same elements" test applies to respondents is inconsistent with this Court's decisions in *Halper* and *Kurth Ranch.*

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more than that the defendants must show that the civil sanction arises from the same facts as the "unit of prosecution" involved in the criminal proceeding. In a series of drug distributions, Tuesday's sale may support a forfeiture and Friday's separate sale a prosecution. If on all the facts of the case the two events are genuinely different units of prosecution then they are not the "same offense" for Double Jeopardy purposes.

25 As shown above, where the facts underlying the forfeiture are distinct from the criminal prosecution double jeopardy is not violated. If the forfeiture was triggered by an offense other than the one for which the claimant was already punished, an additional punishment would not offend.

3. The factual or "unit of prosecution" approach is correct because forfeiture — even criminal forfeiture — is not an offense.

In *Libretti v. United States*, 516 S.Ct. 356 (1995) this Court held that criminal forfeiture was not an "offense" with elements but a "punishment." Similarly, civil forfeiture is not an offense — even syntactically this is obvious as one never speaks of a defendant being guilty of forfeiture or committing a forfeiture — it is a sanction. The *Blockburger* elements-of-the-offense test has no application to these circumstances.

4. In the instant case, the factual and statutory questions are easily resolved.

The trial court granted summary judgment in favor of the United States based upon the respondents' prior convictions for controlled substance and money laundering violations. The government's theory below asserted that the property was forfeitable because of the jury's verdict against respondents for the same charged offense as supported the forfeitures.[26]

Finally, it is apparent from the texts of the statutes themselves that 21 U.S.C. § 881(a)(6) and § 981(a)(1)(A) both authorize forfeitures only upon conduct which wholly subsumes the crimes for which respondents were convicted. The allegations which gave rise to respondents' forfeitures included the same allegations giving rise to their criminal prosecutions: i.e., violations of 21 U.S.C. § 841(a) (1) and § 846, plus 18 U.S.C. § 371 and § 1956.

5. Civil forfeiture and the underlying criminal offenses are a species of greater and lesser included offenses under the *Blockburger / Dixon* "same offense" test.

Even if respondents' forfeitures were an "offense," as the petitioner argues, they are offenses which wholly subsume the

26 The question is, What conduct did the government rely upon in its civil case? In Respondents' case, summary judgment was based on the very offenses that resulted in respondents' convictions and little else.

substantive criminal offenses set forth in Title 21 and the money laundering statutes. Consequently, the government's efforts to forfeiture respondents' property sought to inflict a second punishment for the same offenses for which respondents were previously prosecuted.

a. Under the *Blockburger* test,[27] two offenses are "different" only if each contains an element not present in the other. Otherwise, they are considered the "same offense" under the Double Jeopardy Clause which thus bars both additional punishment and successive prosecution of such offenses. *Dixon*. Because a lesser-included offense never has an element additional to its greater offence, the Double Jeopardy Clause forbids multiple punishment or prosecution of greater and lesser–included offenses.[28]

This Court has also held that the lesser–included offenses approach applies to statutory crimes in which one offense includes as an element a variety of possible lesser offenses. For example, in *Whalen v. United States*, 445 U.S. 684 (1980), the criminal code for the District of Columbia established that any one of six specified felonies could serve as a required element of felony-murder. Examining whether multiple punishment barred both a rape conviction and a felony murder conviction based upon the same rape, the Court held that this type of statute presents a situation no different from the typical greater and lesser-included offense paradigm. *Id*. at 694 ("[W]e are unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense"). In successive prosecution cases, this Court has similarly called the underlying predicate

27 284 U.S. 299 (1932).

28 When one offense contains all the elements of another offense plus additional aggravating elements, the first offense is denominated the greater offense, and the latter is called the lesser included. Thus, the lesser included offense will have no elements distinct from the greater offense. In successive prosecution cases, it does not matter which prosecution comes first. *Brown v. Ohio*, 432 U.S. 161, 169 (1977).

felonies, "a species of lesser-included offense." *Dixon*, 113 S.Ct. at 2857; quoting *Illinois v. Vitale*, 447 U.S. 410, 420 (1980); accord, *Harris v. Oklahoma*, 433 U.S. 682 (1977). Thus, when a greater offense contains an element that may be satisfied by any number of discrete criminal offenses, this Court's teachings prevent an abstract approach that ignores the actual predicate crime charged in the case. Instead, *Blockburger* requires that the actual predicate crime charged in each case be inserted into the variable element of the greater offense. To require otherwise would eliminate any meaningful protection from the Clause.

b. Section 881(a)(6) provides for forfeiture of "moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all [such items] used or intended to be used to facilitate any violation of this subchapter." Under this section, the combination of either actual or intended use with the three methods of use — payment, proceeds, or facilitation — yields six different predicate scenarios under which the government can seek forfeiture. As demonstrated above, the *Blockburger* test requires that the actual scenario charged by the government be examined for purposes of a double jeopardy analysis.

In this case, the government moved for summary judgment in the forfeiture proceeding alleging that the claimants' criminal convictions were a sufficient predicate to satisfying this element of forfeiture. Pet. App. 6a; Resp. Arlt's Br. in Opp. 113a-114a. Under the *Blockburger* principles discussed above, if the forfeitures are to be veiwed as a kind of "offense," then the claimants' criminal convictions are thus no more than "a species of lesser included offenses" in relation to the forfeiture, and hence, act as a bar to the prosecution of that claim. See also *United States Titan Court*, 75 F.3d 1470.

The government advances several arguments that the criminal statutes at issue contain additional elements to the

forfeiture statutes. ("The forfeiture statutes do not require proof of any particular crime, . . . the participation of the property owner . . . proof that the owner entertained a mental state required for a criminal conviction.") Pet. Br. 51-52. These arguments all simply ignore this Court's rule that the greater offense cannot be "abstracted from the 'element' of the violated condition." *Dixon*,113 S.Ct. at 2852 (1993). For example, the petitioner's argument that the forfeiture statute does not require the commission of any particular crime is akin the argument dismissed in *Harris v. Oklahoma*, 433 U.S. 682 (1977) where the Court held that a successive prosecution for robbery with firearm is not precluded by a felony-murder conviction predicated upon the same robbery with a firearm.[29] For the same cogent reasons this Court should reject the government's argument here.

Similarly, the government argues that forfeiture may be had even if the property was only "intended" to be used in a drug offense but before any crime had in fact been actually committed. Pet. Br. 52. Be that as it may, the fact is the government chose to seek forfeitures against Respondents based upon their criminal convictions. In this respect, the Court's discussion of this "species of lesser-included offenses" in *United States v. Dixon* is instructive. The *Dixon* defendants were prosecuted first for criminal contempt for violation of an existing court order, and later indicted for criminal offenses arising out of the same incidents underlying the contempt convictions. In applying the *Blockburger* test, the Court rejected the government's argument that the elements of contempt be applied in the abstract — knowledge of a court order and a willful violation of that order. Instead, the majority opinion examined the underlying court order to specify the elements of the "greater offense" of contempt in each case. For example, for

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29 Similarly, if the claimants were not prosecuted in the underlying criminal case, they obviously would not have a double jeopardy claim. Fundamentally, all the government's arguments "apply *Blockburger* at too abstract a level." *Titan Court*, 75 F. 3d at 1490 (1996).

Alvin Dixon, the trial court order directed the defendant not to commit "any criminal offense" while on release for another charge. A subsequent drug offense became the basis for both the contempt conviction and the later criminal indictment. The Court held that the court order, "incorporated the entire governing criminal code in the same manner as the *Harris* felony-murder statute incorporated the several emunerated felonies." *Dixon,* 113 S.Ct. at 2857. As a result, the drug indictment did not contain any element not contained in his previous contempt conviction and this prosecution was therefore barred by Double Jeopardy.[30]

As with *Dixon*, this case requires an "anomalous" application of the *Blockburger* test: the greater-included proceeding is denominated as a "civil" case. See *Dixon*, 113 S.Ct. at 2855 (these cases are the "consequence of an historically anomalous use of the contempt power"). Here, because the statutory provisions for forfeiture denominate the "offense" as a civil wrong, they contain remedies for conduct that are not necessarily criminal. Nevertheless, this Court has applied constitutional protections to such "civil" forfeitures when the forfeiture involves a violation of a criminal statute.[31] Respondents faced no less: the goverment

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30 In the companion case, Michael Foster was tried for various violations of a civil protection order ordering him not "molest, assault, or in any manner threaten or physically abuse" his estranged wife. He was later indicted by the grand jury based on a number of the same incidents from the contempt hearing. *Dixon* a1113 S.Ct. at 2853-54.

31 Civil forfeitures often reference a criminal violation, and such statutes are distinct from merely regulatory enactments. For example, this Court examined a Customs statute that authorized the forfeiture of property for regulatory violations, regardless of any underlying criminal conduct. *One Lot Emerald Cut Stones v. United States,* 409 U.S. 232, 236 (1972) (per curiam). The absence of a criminal component reduced the owner's claim to constitutional protections. With respect to forfeitures predicated upon criminal violations, however, the law has long been otherwise:

> But as *Boyd v. United States,* 116 U.S. 616, 634 (1886),

sought to impose punishment in two successive proceedings, and the punishments depended upon the literal violation of the same offenses for which respondents were previously criminally tried, convicted, and punished.

The government seeks to escape from the scrutiny of the Double Jeopardy Clause in this case by cloaking its efforts to punish respondents twice as a merely civil pursuit of a civil remedy. Instead, the line of cases beginning with *Harris* and through *Dixon* require that the elements of this forfeiture include the actual underlying criminal offenses used by the government as the predicate for forfeiture. When examined in this light, the Ninth Circuit was correct in holding that if the Wren forfeiture can be called an "offense" at all, it was a greater offense of the criminal cases and was hence barred by the Double Jeopardy Clause.[32]

> makes clear, "proceedings instituted for the purpose of declaring the forfeiture of a man's property *by reason of offences committed by him,* though they may be civil in form, are in their nature criminal" for Fifth Amendment purposes.

Id. n. 6. This precise analysis has been applied to modern *in rem* forfeitures. *One 1958 Plymouth Sedan v. Commenwealth of Pennsylvania*, 380 U.S. 693 (1965); *United States v. United States Coin & Currency,* 401 U.S. 715, 718 (1971).

32 The government contends that forfeiture and the underlying criminal offenses are not greater and lesser-included offenses because this relationship does not exist unless "every violation of the statute defining the greater offense 'necessarily entails a violation of' the statute defining the lesser offense." citing *United States v. Woodard*, 469 U.S. 105, 107 (1985) (*per curiam*); *Brown,* 116 U.S. at 634; and *Schmuck v. United States*, 489 U.S. 705, 716, 719 (1989). However, none of these cases involves the classic *Harris* statutory scheme which involves a greater offense with a number of qualifying predicate crimes for a particular element. Obviously, once the predicate crime is inserted in the variable element, as these cases require, a violation of the greater offense will necessarily involve a violation of the lesser-included offense.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be affirmed.[33]

Respectfully submitted.

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MARCH 1996

Respondents wish to specially acknowledge the contribution of Michael L. Montalvo, inmate law student (28 C.F.R. § 543.11(f)).

Respondents also acknowledge the contribution of Peter Goldberger and David Zlotnick of Families Against Mandatory Minimums; Robyn Pugsley; Harlan Boyd; Brenda Grantland; and the National Association of Criminal Defense Lawyers' Forfeiture Task Force.

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33 Petitioner seeks reversal. Respondents, however, raised issues other than the double jeopardy bar to their *in rem* forfeiture. The appellate court did not reach these other issues except in dicta regarding the lack of probable cause. Because other issues were not reached in the court below, the government's remedy, at most, would be a remand.

(15) (19)

Nos. 95-345 and 95-346

Supreme Court, U.S.
FILED
APR 10 1996
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

GUY JEROME URSERY

UNITED STATES OF AMERICA, PETITIONER

v.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SIXTH AND NINTH CIRCUITS

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

Respondents and their amici approach the issues raised by these cases as if the Double Jeopardy Clause never existed before *United States* v. *Halper*, 490 U.S. 435 (1989). They construe that decision as having overruled, without comment, a unanimous decision rendered barely five years earlier finding the Double Jeopardy Clause "not applicable" to a civil forfeiture sanction, *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984), and as having entirely displaced

the traditional imposition of criminal punishment and civil *in rem* forfeiture based on the same events, which this Court unanimously sustained against a double jeopardy attack in *Various Items of Personal Property* v. *United States*, 282 U.S. 577, 581 (1931). In respondents' view, either Congress must create novel hybrid proceedings in which civil and criminal cases are tried together under a single caption or prosecutors must use criminal forfeiture (which, unlike civil forfeiture, was entirely unknown in this country before 1970, see 1 C. Wright, *Federal Practice & Procedure* § 125.1, at 389 (2d ed. 1982)) whenever they seek to forfeit the property of a potential criminal defendant. Such a radical revision of how our justice system has operated since 1791 would require the most compelling justifications. Respondents' proposal instead arrives unsupported by doctrine or history, and should accordingly be rejected.

1. Respondent Ursery does not address this Court's recognition that, as used in the Fifth Amendment, the term "jeopardy" refers to a specific danger: the risk of conviction that a defendant faces before a tribunal vested with jurisdiction to find him guilty of a crime. See, *e.g.*, *Breed* v. *Jones*, 421 U.S. 519, 528 (1975). Nor does he expressly take issue with our submission that this Court's understanding of "jeopardy" rests on the unique role and consequences of criminal sanctions and on the Double Jeopardy Clause's historical origins in common-law pleas peculiar to the criminal process. He assumes instead that *Halper* overruled those cases and rejected that traditional understanding, because, in his view, *Halper*'s conclusion that a civil action can violate the Clause necessarily rests on the conclusion that "the civil proceeding constitutes a second—i.e., a 'double'—jeopardy." Ursery Br. 31; see also *id.* at 10; ACLU Br. 20 (noting that, after *Halper*, jeopardy "refers to [the] risk of any punitive governmental action").

That contention is incorrect, because it disregards the fact that *Halper* did not create the "multiple punishments" doctrine. As we have explained (U.S. Br. 26-31), that doctrine already had a settled meaning when the Court invoked it in *Halper*. As applied to successive punishments, the doctrine was, and remains, a rule of finality for the "jeopardy" experienced as a result of a criminal conviction. Cf. ACLU Br. 20 n.11 (conceding that a "central purpose" of the Clause is to protect "the finality of jury verdicts"). While Ursery argues that the logic of *Halper* requires recognition of a new concept of "civil" jeopardy, see Ursery Br. 32, he overlooks that multiple-punishments analysis has never entailed a showing of two "jeopardies." See U.S. Br. 27-28. Rather, that analysis stems from *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874), which involved only one criminal prosecution, and had been applied before *Halper* only to support two legal rules: (1) that a court, in a single proceeding, may not impose more punishment than the legislature intended, and (2) that following service of a criminal sentence, a court may not upset legitimate expectations of finality by imposing a new sentence. Neither of those applications required a second "jeopardy"; and the same is true of *Halper*, which extended multiple-punishments analysis to cover a punitive civil sanction imposed after a criminal conviction.[1]

Respondent fares no better with his analysis of *Department of Revenue of Montana* v. *Kurth Ranch*, 114 S. Ct.

[1] While Ursery faults our reading of *Halper* as lacking support on anything that "the Court *said*" in that case, his own interpretation is able to explain *Halper*'s repeated and explicit emphasis on the defendant's prior conviction only by dismissing it as "simply a reflection of the fact pattern in *Halper*." Ursery Br. 32. But the *Halper* Court made clear that the prior conviction had operative legal significance in that case by expressly stating that the "only proscription" established by the Court's ruling was against the imposition of a punitive civil judgment after the imposition of a "criminal penalty." *Halper*, 490 U.S. at 451; see *id.* at 448-449 (stating Court's holding). And Ursery makes no effort to respond to our doctrinal analysis, which shows how *Halper* developed from a prohibition against multiple punishments that applies only when there is a prior criminal conviction.

1937 (1994). That case does not establish that "when the government seeks and obtains a civil sanction[] the defendant may be placed in 'jeopardy' sufficient to trigger double jeopardy protections." Ursery Br. 32-33. While *Kurth Ranch* began by asking whether the "tax" in that case "may violate the constitutional prohibition against successive punishments for the same offense," 114 S. Ct. at 1941, it concluded by holding that "[t]he proceeding Montana initiated to collect a tax on the possession of drugs was *the functional equivalent of a successive criminal prosecution* that placed the Kurths in jeopardy a second time 'for the same offence,'" *id.* at 1948 (emphasis added). As we have explained (U.S. Br. 34), in light of that language—and the Court's conclusion that the tax "must be imposed during the first prosecution *or not at all*," 114 S. Ct. at 1948 (emphasis added)—*Kurth Ranch* is best understood as finding the Montana tax to be so inherently punitive that the State could not impose it at all outside the context of a criminal prosecution. See, *e.g.*, *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963). In any event, it is clear that in *Kurth Ranch*, as in *Halper*, the defendant had suffered a prior criminal judgment (*i.e.*, a "jeopardy") to which a constitutional expectation of finality could attach. Ursery, in contrast, incurred no such judgment in the *in rem* forfeiture action.[2]

[2] Ursery claims in passing (Br. 28-30) that 21 U.S.C. 881(a)(7) is inherently penal under this Court's analysis in *Kennedy* v. *Mendoza-Martinez*, *supra*, such that he may claim the Double Jeopardy Clause's protection against multiple prosecutions. That claim is foreclosed by *89 Firearms*, *supra*, which rejected it with respect to an identically worded forfeiture statute. Contrary to Ursery's claim (Br. 30), *89 Firearms* cannot be distinguished on the ground that the statute at issue in that case sought to remove from circulation "potentially dangerous" firearms. While firearms are indeed potentially harmful (*Staples* v. *United States*, 114 S. Ct. 1793, 1800 (1994)), "the fact remains that there is a long tradition of widespread lawful gun ownership by private individuals in this country" (*id.* at 1799) and therefore "owning a gun is usually licit and blameless conduct" (*id.* at 1801). Thus, the "potential" for danger that Ursery concedes is sufficient to make forfeiture of firearms "plainly more remedial than punitive" (Ursery Br. 30) flows from use of those firearms in violation of the criminal laws, which is a traditional justification for forfeiting instrumentalities of crime generally.

Witte v. *United States*, 115 S. Ct. 2199 (1995), reinforces the conclusion that a prior "jeopardy," understood as the risk of conviction for a criminal offense, remains an essential predicate for invoking the Double Jeopardy Clause. *Witte* rejected a double jeopardy claim precisely because the defendant had not faced a prior criminal prosecution for the offense for which he purportedly was punished. Ursery seeks to explain *Witte* by suggesting (Br. 33-34 & n.17) that Witte's first criminal sentence was authorized by the Guidelines, even if it also reflected a punitive enhancement for a different crime for which he was later separately prosecuted. That explanation does not distinguish this case, because everything the government did here was duly authorized by statute. Nor is it responsive to our basic point about *Witte*: that the Court's reasoning and judgment cannot be squared with respondent's view that the Court has abandoned the traditional understanding of "jeopardy." Indeed, while Ursery ultimately asserts that *Witte* cannot mean what the Court's opinion says, because "such a reading * * * could not be squared with *Halper* or *Kurth Ranch*," Ursery Br. 34 n.17, the more accurate conclusion is that *Witte* shows why Ursery's reading of *Halper* and *Kurth Ranch* is incorrect.

The anomalous consequences of Ursery's notion that civil sanctions can give rise to "jeopardy" are illustrated by his claim (Br. 35-39) that his crime is a lesser-included offense of *in rem* forfeiture under 21 U.S.C. 881(a)(7). The rules governing lesser-included offenses provide that a defendant may be convicted of any lesser offense that the jury finds proven when the jury does not convict on the greater offense. See Fed. R. Crim. P. 31(c); *Schmuck* v. *United States*, 489 U.S. 705, 717-718

(1989); see also *Rutledge* v. *United States*, No. 94-8769 (Mar. 27, 1996), slip op. 12-15 (when conviction for a greater offense is reversed on grounds that do not affect a lesser-included offense, a court generally may enter judgment on the lesser-included offense). It is meaningful to say that a criminal defendant is "in jeopardy" for lesser-included offenses whenever he is put to trial on a greater offense, because ordinarily a possible legal outcome of the proceeding is the entry of a judgment of conviction for the lesser-included crime. That plainly is not true of the purported "jeopardy" that results from the institution of civil forfeiture proceedings; there is *no* possibility that the court, upon finding the purported "additional element" of the forfeiture "offense" not proven, could instead enter a judgment convicting the property claimant of a crime.

Thus, both this Court's cases and a common-sense appraisal of the limited risks that Ursery actually faced in the forfeiture proceeding demonstrate that his double jeopardy claim is untenable. That acceptance of Ursery's claim would require, as his amici essentially concede (see ACLU Br. 6 n.2), the outright repudiation of a line of authority that this Court unanimously endorsed little over a decade ago in *89 Firearms* simply adds to the heavy burden of justification that his claim faces in this Court. Compare *United States* v. *Felix*, 503 U.S. 378, 389 (1992). He has not met that burden.

2. Respondents dispute our submission that civil *in rem* forfeitures cannot be said to inflict "punishment" for purposes of the Double Jeopardy Clause. Respondents contend that our argument is inconsistent with *Halper* and *Austin* v. *United States*, 113 S. Ct. 2801 (1993), and that it would require the Court to "overrule[]" those cases (Ursery Br. 18; see also Arlt & Wren Br. 12). That is not so. A holding that the proceedings in these cases are constitutional does not require the Court to reject its holding in *Halper* that the "multiple punishments" doctrine of double jeopardy law precludes a punitive civil

sanction after a criminal defendant's conviction, or its holding in *Austin* that the Excessive Fines Clause of the Eighth Amendment applies to *in rem* forfeitures.

Our opening brief made two points relevant to respondents' claim that civil forfeitures under 21 U.S.C. 881 are categorically punitive. U.S. Br. 38-40. First, we noted that a single passage in *Halper* (which *Austin* later reiterated) suggested that a sanction that acts in any part as a deterrent must be viewed as "punishment," but we explained that that passage is unjustifiably broad and unnecessary to the holding in either *Halper* or *Austin*. Second, we noted that *Austin* expressly recognized that it did not make any difference, in the context of an Eighth Amendment claim, whether all forfeitures under 21 U.S.C. 881(a)(4) and (a)(7) are categorically deemed to be "punishment," since only "excessive" forfeitures would be barred. Thus, two key legal propositions on which respondents base their claims that civil forfeiture under 21 U.S.C. 881 is always punishment for double jeopardy purposes are dicta. An argument that the Court should disavow those propositions cannot fairly be read as seeking the overruling of *Halper* and *Austin*; it merely "invok[es] [the Court's] customary refusal to be bound by dicta." *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386, 391 (1994); see also *Metropolitan Stevedore Co.* v. *Rambo*, 115 S. Ct. 2144, 2149 (1995); *Kokkonen* v. *Guardian Life Ins. Co. of America*, 114 S. Ct. 1673, 1676 (1994).

This Court's most recent forfeiture decision, *Bennis* v. *Michigan*, 116 S. Ct. 994 (1996), shows that respondents' reading of *Halper* and *Austin* is overbroad. *Bennis* rejected the claim that an innocent owner has a constitutional defense to the forfeiture of property that "facilitated and was used in criminal activity." *Id.* at 1001. In so doing, the Court made clear that "forfeiture * * * serves a deterrent purpose distinct from any punitive purpose," *id.* at 1000—*i.e.*, that deterrence itself is *not*

punitive and that a deterrent purpose is not sufficient to transform a forfeiture into "punishment." The Court thus declined to depart from its "longstanding practice" (*id.* at 1001) in civil forfeiture cases, a practice that is "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced," *ibid.* (quoting *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 511 (1921)).

That long common-law lineage of civil forfeitures of property used to commit or facilitate crimes is especially significant in assessing respondents' claims of former jeopardy, because "[i]n applying a provision like that of double jeopardy, which is rooted in history and is not an evolving concept * * *, a long course of adjudication in this Court carries impressive authority." *Gore* v. *United States*, 357 U.S. 386, 392 (1958); see also *Richardson* v. *United States*, 468 U.S. 317, 325-326 (1984); *Green* v. *United States*, 355 U.S. 184, 199 (1957) (Frankfurter, J., dissenting). *Austin* concluded that civil forfeitures of instrumentalities of crime always have been understood as embodying an element of punishment, which is sufficient to bring the Eighth Amendment into play. 113 S. Ct. at 2807-2809. Respondents, however, cannot show that those forfeitures *ever* have been deemed sufficiently punitive to trigger double jeopardy protections. Indeed, they do not cite a single case from this Court that has so held.

That failure is telling, because the Fifth Amendment has been on the books since 1791 and laws that authorized *both* a civil forfeiture of property used to commit crimes *and* a criminal prosecution of the property's owner were among the earliest statutes enacted by Congress.[3]

[3] *Austin* relied on the first comprehensive customs statute, enacted two months before Congress proposed the Bill of Rights to the States, to demonstrate that the Framers of the Eighth Amendment considered *in rem* forfeiture, at least in part, as a punitive measure. 113 S. Ct. at 2807-2808. The provision cited by *Austin* forbade unloading goods at night or without a permit. It provided not only for criminal punishments for any ship master who permitted such unloading (he was required to pay a fine and was barred from holding federal office or employment, and in addition his name was to be published "in the public gazette of the State in which he resides, within twenty days after * * * conviction"), but it also *mandated* forfeiture *in rem* of the offending property. See Act of July 31, 1789, ch. 5, § 12, 1 Stat. 39. That provision was hardly an anomaly. See § 25, 1 Stat. 43 (monetary fine on persons convicted of knowingly concealing or buying illegally imported goods *in addition to* the *in rem* forfeiture of the goods); § 34, 1 Stat. 46 (up to six months' imprisonment on persons convicted of re-landing goods entitled to a drawback *in addition to* the *in rem* forfeiture of the goods, the vessels carrying them, and any boats used in loading and unloading them). Similar provisions were included in customs statutes enacted after the Bill of Rights was ratified. See Act of Aug. 4, 1790, ch. 35, §§ 27, 49, 60, 1 Stat. 163, 170, 174; Act of Mar. 2, 1799, ch. 22, §§ 50, 69, 82, 1 Stat. 665, 678, 692. Those provisions were codified in substantially similar form in Sections 2873, 2874, 3049 and 3082 of the Revised Statutes (1874).

Indeed, in one of its earliest forfeiture decisions, this Court noted (in rejecting, ironically, the claim that the government was *required* to prosecute criminally before it could obtain an *in rem* forfeiture) the accepted practice of imposing both sanctions:

> Many cases exist, where there is both a forfeiture *in rem* and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. [Rather,] the practice has been, and so this Court understand the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*.

The Palmyra, 25 U.S. (12 Wheat.) 1, 14-15 (1827) (Story, J.); see also *In re Lezynsky*, 15 F. Cas. 397, 400-401 (C.C.S.D.N.Y. 1879) (No. 8,279) (noting that early statutes frequently called for criminal prosecution of persons whose property was also civilly forfeitable).[4]

[4] No question concerning the validity of such "dual" enforcement schemes was even raised until *Coffey* v. *United States*, 116 U.S. 436 (1886), held that an acquittal in a criminal trial precluded relitigation of the same facts in a civil *in rem* proceeding. See *United*

The fact that civil forfeiture has never been thought sufficiently punitive to raise double jeopardy concerns when Congress provides for it in addition to the criminal prosecution of the property's owner "goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice." *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 327-328 (1936); see also *Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 728 n.2 (1988); *Bowsher* v. *Synar*, 478 U.S. 714, 723-724 & n.3 (1986); *Marsh* v. *Chambers*, 463 U.S. 783, 790-792 (1983). Indeed, this Court unanimously rejected a double jeopardy claim comparable to that of respondents in *Various Items of Personal Property* v. *United States*, 282 U.S. 577, 581 (1931), see U.S. Br. 21—a decision that respondents *sub silentio* would apparently have this Court overrule.

Amicus ACLU attempts to downplay the significance of the historical record by asserting that early *in rem* forfeiture statutes applied only to illegally imported merchandise, the equivalent of forfeiting illegal contraband.

States v. *Olsen*, 57 F. 579, 584-585 (N.D. Cal. 1893) (discussing *Coffey* and noting that "until recently no question has been raised as to the right of the government to proceed in one action for the forfeiture of the offending thing, and in another for the punishment of the offender"); see also Rufus Waples, *Treatise on Proceedings In Rem* § 21, at 23-24 (1882). *Coffey* was ambiguous on the extent to which its conclusion was based on double jeopardy law, see *89 Firearms*, 465 U.S. at 358, 361, and the lower courts continued to adhere to the view that an *in rem* forfeiture of property and the criminal prosecution of its owner were not barred by double jeopardy. See, *e.g.*, *United States* v. *Three Copper Stills*, 47 F. 495, 499 (D. Ky. 1890) ("[t]here is no case known to me which decides that [double jeopardy] includes a proceeding *in rem*"); *Olsen*, 57 F. at 584-585; but see *United States* v. *One Distillery*, 43 F. 846, 853 (S.D. Cal. 1890) (relying in part on *Coffey* to hold that government could not bring both civil forfeiture action and criminal prosecution), aff'd on other grounds, 174 U.S. 149, 152 (1899). This Court expressly overruled *Coffey* in *89 Firearms*, where it acknowledged that "for nearly a century" *Coffey*'s "analytical underpinnings * * * ha[d] been recognized as less than adequate." 465 U.S. at 361.

ACLU Br. 11, 22; see also Ursery Br. 29-30. As is clear from the Act of July 31, 1789, however, those statutes frequently required the forfeiture of the boats and vessels that *facilitated* the unlawful activity in addition to the merchandise itself. Nor were the early *in rem* forfeiture provisions limited to customs laws. From 1789 to 1819, multi-faceted enforcement schemes, employing *in personam* penalties in conjunction with *in rem* forfeiture, were used in statutes that regulated the registration of vessels;[5] required the licensing of vessels employed in coastal trade and fisheries;[6] prohibited trade with Indian tribes without a license;[7] penalized the outfitting and arming of vessels intended to be used in the service of a foreign state;[8] outlawed the importation of slaves from foreign countries;[9] and criminalized acts of pi-

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[5] See Act of Sept. 1, 1789, ch. 11, §§ 35-36, 1 Stat. 65 (providing for the forfeiture of any vessel using a fraudulent certificate of registry *and* penalizing the person who committed the fraud), reenacted in Act of Dec. 31, 1792, ch. 1, §§ 27-28, 1 Stat. 298.

[6] See Act of Feb. 18, 1793, ch. 8, §§ 30, 32, 1 Stat. 316 (providing for the forfeiture of any vessel, as well as its cargo, with a forged or altered license *and* penalizing the person who falsified the license).

[7] Act of Mar. 1, 1793, ch. 19, § 3, 1 Stat. 329 (imposing fine or imprisonment, or both, on any person attempting to trade with Indian tribes without a license *and* providing for the forfeiture of all merchandise in that person's possession).

[8] See Act of June 5, 1794 (the "Neutrality Act"), ch. 50, § 3, 1 Stat. 383 (in addition to forfeiture of the vessel and all materials and ammunition "procured for the building and equipment thereof," "every such person so offending shall upon conviction be adjudged guilty of a high misdemeanor").

[9] See Act of Mar. 2, 1807, ch. 22, § 2, 2 Stat. 426 (any ship or vessel fitted out for the importation of slaves from foreign countries "shall be forfeited to the United States, and shall be liable to be seized, prosecuted, and condemned in any of the circuit courts or district courts, for the district where the said ship or vessel may be found or seized"); § 3, 2 Stat. 426 (any person who so fits out a vessel, knowing it to be used for that purpose, shall "forfeit and pay twenty thousand dollars"). See also § 4, 2 Stat. 427 (any per-

racy.[10] Similar provisions were commonly found in later statutes regulating the taxation of distilled spirits [11] and banning the importation of immigrant laborers.[12]

Ursery and amicus ACLU attempt to recast *Austin* as holding that 21 U.S.C. 881 always inflicts "punishment," even if other forfeitures of property used to commit crimes generally would not be punitive. See Ursery Br. 22-23; ACLU Br. 11-17. That turns *Austin* on its head. While *Austin* did examine specific features of 21 U.S.C. 881(a)(4) and (a)(7), it did so only to ascertain whether anything in the text or history of those provi-

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son who takes a slave on board his ship with the intent to sell the slave in the United States shall forfeit and pay five thousand dollars, *and* the ship and all of its cargo shall be liable for seizure); § 7, 2 Stat. 428 (any vessel caught with a slave on board within United States waters in violation of the Act shall be forfeited, along with all of its cargo and effects, *and* the captain, master, or commander of the vessel shall be subject to prosecution for a high misdemeanor). Similar provisions were reenacted in the Act of Apr. 20, 1818, ch. 91, 3 Stat. 450.

[10] See Act of Mar. 3, 1819, ch. 77, §§ 4-5, 3 Stat. 513-514 (punishing acts of piracy on the high seas with death *and* providing for the forfeiture, in any court having admiralty jurisdiction, of any vessel involved in piratical aggression).

[11] See, *e.g.*, Act of July 13, 1866, ch. 184, § 14, 14 Stat. 151 (providing for *in rem* forfeiture of distilled spirits—as well as any materials, utensils, or vessels used in their making—that are removed or concealed with the intent to defraud the revenue *and* imposing fine on any persons concerned in such intentional removal or concealment (codified at Rev. Stat. § 3450 (1874)); Act of July 20, 1868, ch. 186, § 19, 15 Stat. 133 (imposing fine and imprisonment on any person who makes a false entry in books with intent to defraud the revenue *and* providing for *in rem* forfeiture of the distillery, distilling apparatus, the tract of land on which it stands, and all personal property on the premises used in the distilling business) (codified at Rev. Stat. § 3305 (1874)). See also Rev. Stat. §§ 3257, 3281 & 3451.

[12] See Act of July 5, 1884, ch. 220, §§ 2, 10, 23 Stat. 115, 117 (providing that vessel may be libelled if vessel master knowingly transports Chinese laborers in violation of the Act *and* providing that master shall be guilty of a misdemeanor).

sions "contradict[ed] the historical understanding of forfeiture as punishment." 113 S. Ct. at 2810. The Court concluded that the legislative background of 21 U.S.C. 881 did not dispel what the Court believed always has been true of all forfeitures of property used in the commission of crime—that they "historically have been understood, at least in part, as punishment." 113 S. Ct. at 2810. In light of the Court's assimilation of 21 U.S.C. 881(a)(4) and (a)(7) to the traditional understanding of provisions forfeiting property used to commit crimes, *Austin* cannot now be turned into a special rule for narcotics forfeiture cases.

Amicus ACLU argues that forfeitures of instrumentalities under Section 881 do not serve the traditional aims of that *in rem* remedy, because "supposedly remedial objectives are nowhere mentioned in the legislative history." Br. 12. An Act of Congress, however, is not deemed to serve only those objectives that are described in its legislative history. See *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988); see also *Moskal* v. *United States*, 498 U.S. 103, 111 (1990). Instead, Congress is presumed to know the law, see *Callanan* v. *United States*, 364 U.S. 587, 594 (1961), and when it enacts statutes that invoke settled legal concepts, it ordinarily must be understood to have adopted those concepts. See, *e.g.*, *Director, OWCP* v. *Greenwich Collieries*, 114 S. Ct. 2251, 2256-2257 (1994); see also *Shannon* v. *United States*, 114 S. Ct. 2419, 2425 (1994). Thus, by enacting an *in rem* remedy with a long-standing lineage and recognized rationale, Congress subscribed to the traditional aims of that remedy and "expect[ed] its enactment[] to be interpreted in conformity with them." *North Star Steel Co.* v. *Thomas*, 115 S. Ct. 1927, 1930 (1995). No argument advanced by the ACLU establishes otherwise.[13]

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[13] The *in rem* label, of course, is not dispositive of the constitutional analysis. See ACLU Br. 11. But whether a forfeiture statute would be recognized as remedial by the Framers turns on whether it serves the purposes of the early forfeiture statutes that

Ursery also argues (Br. 24-25), that the forfeiture of his property should be deemed "punishment" for double jeopardy purposes under a *Halper* case-by-case analysis. That argument is unsound because it relies on a "presumption" (Br. 24) in Ursery's favor. Respondent, however, is the party asserting former jeopardy, and he is required affirmatively to establish his entitlement to that defense. See, *e.g.*, *Schiro* v. *Farley*, 114 S. Ct. 783, 791-792 (1994); *Dowling* v. *United States*, 493 U.S. 342, 350 (1990). He has failed to show that the civil sanction in the forfeiture action bears such a lack of proportion to the harms resulting from his multi-year marijuana-manufacturing operation that it must be branded as punitive. See U.S. Br. 46.[14]

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were familiar to the Framers. As this Court's recent decision in *Bennis* shows, the correct analysis does not turn, as amicus suggests (see ACLU Br. 12, 16), on purely formal matters, such as whether forfeiture was available at common law for the particular violation of law. *Bennis* recognized that, for constitutional purposes, the remedial ends of forfeiture can be advanced even in a civil proceeding *in personam*. Nor does the correct analysis depend on whether Congress has provided for an analogous remedy as part of a criminal sentence, as it did when it enacted criminal forfeiture statutes. Congress has also provided that criminal sentences may require the defendant to pay restitution to his victims, see 18 U.S.C. 3556, yet no one would suggest that the availability of that remedy as part of a criminal sentence necessarily renders the goal of victim compensation inherently punitive.

[14] For the same reason, Ursery errs in asserting that, as a factual matter, the forfeiture action and the prosecution were based on the same offense. See Ursery Br. 40-42. We do not, of course, dispute the proposition that a single criminal offense cannot be broken down into separate "theories"; that assertion, however, begs the question of what the unit of prosecution *is*, and Ursery cannot seriously contend that growing marijuana over several years, season in and season out, constitutes a single crime of manufacturing marijuana. Because the forfeiture complaint alleged that respondent did precisely that, he cannot sustain his burden of showing that the consent judgment necessarily rests on the manufacturing offense for which he was criminally prosecuted. Compare *Schiro* v. *Farley*, 114 S. Ct. at 792.

3. Respondents Arlt and Wren argue that the forfeiture of their narcotics proceeds under 21 U.S.C. 881(a)(6) constituted "punishment." As we explained in our opening brief, however, separating a criminal from the proceeds of his crimes cannot fairly be characterized as "punishment."[15] Arlt and Wren dispute that conclusion (Br. 16-31), claiming that the forfeiture of such proceeds amounts to the "taking of lawful property" (Br. 19) for a punitive purpose by the government. In support of that claim, they note that proceeds of narcotics trafficking represent not only the profits of that activity but also "some investment" of legitimate "capital and of labor in the economic endeavor." Br. 30.

The proceeds of drug trafficking, however, are not "lawful" property. That conclusion becomes apparent when respondents' activities are broken down into their component parts. Arlt and Wren invested capital and labor in the purchase and production of contraband; they then sold that contraband to obtain the properties that are the subject of this forfeiture action. They concede (Br. 27) that, notwithstanding their investment of time and legitimate capital, the contraband could have been forfeited without imposing punishment on them. See *Austin*, 113 S. Ct. at 2811; *89 Firearms*, 465 U.S. at 364. It follows that they have no greater right to possess the proceeds of the sale of that contraband; indeed, the fact that the government seeks to forfeit proceeds instead of contraband is a fortuitous result of the point at which the authorities interrupted respondents' criminal venture. Simply put, capital invested in illegal activity loses its

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[15] Respondents assert (Arlt & Wren Br. 23-24) that the assets forfeited from them constituted more than the proceeds of illegal activity. The district court's findings of fact and conclusions of law, however, demonstrate that the court found that all of the defendant properties constituted the proceeds of respondents' illegal methamphetamine trade. See 95-346 Pet. App. 55a-66a. Only after reaching that conclusion did the court consider whether the defendant properties also were subject to forfeiture under 18 U.S.C. 981(a)(1) as property "involved in" money laundering violations.

legitimate character: the labor involved in an illegal enterprise is not "honest labor" that is entitled to societal recognition, and the owner of property from the sale of drugs "has no reasonable expectation that the law will protect, condone, or even allow his continued possession of such proceeds." *United States* v. *Tilley*, 18 F.3d 295, 300 (5th Cir.), cert. denied, 115 S. Ct. 573, 574 (1994). See also *United States* v. *Clementi*, 70 F.3d 997, 1000 (8th Cir. 1995).

Arlt and Wren maintain (Br. 26-28) that the forfeiture of proceeds constitutes punishment because the owner of property derived from a drug transaction may validly transfer the property to a bona fide purchaser or an innocent donee. See *United States* v. *92 Buena Vista Ave.*, 507 U.S. 111, 127 (1993) (plurality). The statutory innocent owner defense, however, depends on a showing of the transferee's lack of knowledge of the illegal source of the funds; it does not presuppose a free-standing lawful right to possess such proceeds in the transferor.[16] See 21 U.S.C. 881(a)(6). Recognition of that defense accommodates and protects routine and good faith commercial activity. It does not change the fact that the illegal proceeds themselves are simply a substitute for the contraband that produced them.

Finally, there is also no substance to respondents' contention (Arlt & Wren Br. 25-26) that the forfeiture of drug proceeds is punitive because such forfeitures are not intended to provide restitution to a victim but instead to repay the government for "all of society's costs of drug abuse." The forfeiture of drug proceeds is remedial because it deprives a wrongdoer of property that he did not lawfully obtain. Thus, it is similar to disgorgement, which is a remedial measure that does not invariably result in restitution to the wrongdoer's victims. See *Texas American Oil Corp.* v. *Department of Energy*, 44 F.3d 1557, 1569-1570 (Fed. Cir. 1995) (en banc) (disgorgement is a remedial measure distinct from restitution); *SEC* v. *Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994) (disgorgement is remedial whether victims of wrongdoing are private citizens or government); *SEC* v. *Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978) ("The purpose of disgorgement is not to compensate the victims of the fraud, but to deprive the wrongdoer of his ill-gotten gain"). See also *Tull* v. *United States*, 481 U.S. 412, 422-423 (1987) (contrasting a requirement that a defendant "disgorge profits," which is equitable in nature, with a statutory requirement intended to inflict "punishment"). The bank robber who is arrested as he exits the bank does not acquire immunity from prosecution when the stolen money is seized from him, irrespective of whether the money is ultimately returned to the bank. Indeed, if the government were to keep the money, its actions might be wrongful as to the bank, but they would not confer any constitutional rights on the robber.[17]

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[16] Respondents' hypothetical (Br. 28) in which a person uses a $10,000 bank loan to buy cocaine misses the mark for the same reason. Although the $10,000 constitutes "money[] * * * intended to be furnished * * * in exchange for a controlled substance" and thus would be subject to forfeiture under Section 881(a)(6), the bank would be entitled to assert a statutory innocent owner defense against a forfeiture action brought against the money. Moreover, because this case involves "proceeds traceable" to a drug transaction, and not money intended to be furnished for such an exchange, respondents' hypothetical has little bearing on the facts of this case.

[17] Proceeds forfeitures also serve the remedial purposes of compensating the government for the costs of investigating and prosecuting the underlying offenses and of defraying the societal cost of drug abuse. See, *e.g.*, *United States* v. *$184,505.01*, 72 F.3d 1160, 1168-1169 (3d Cir. 1995); *Tilley*, 18 F.3d at 299-300. But because the forfeiture of illegally obtained property will always be directly proportional to the remedial purpose of disgorging illegal gains and preventing unjust enrichment, recourse to its other remedial purposes is not necessary to find that the forfeitures at issue in *$405,089.23* are not punitive. Contrary to respondents' contention (Arlt & Wren Br. 25), therefore, the government need not support the forfeiture of illegal proceeds by establishing its costs of its investigation and prosecution of the underlying offenses.

4. Respondents defend the Sixth and Ninth Circuits' conclusion that forfeiture is a greater "offense" of the crimes that give rise to the forfeiture. See Arlt & Wren Br. 44-48; Ursery Br. 35-39. As we have explained, that characterization is anomalous, because the two "offenses" lack the characteristics ordinarily associated with greater and lesser offenses. That anomaly is not lessened by respondents' attempt to analogize the forfeiture "offense" to felony-murder. The Court's conclusion that felony-murder is the "same offense" under *Blockburger* v. *United States*, 284 U.S. 299 (1932), as the underlying felony flows from its characterization of felony-murder as nothing more than an aggravated form of that felony. See *Whalen* v. *United States*, 445 U.S. 684, 694 (1980) (double jeopardy analysis of felony-murder is the same as if the legislature "had separately proscribed the six different species of felony murder under six statutory provisions"). The fact that a State has a single felony-murder statute that incorporates all qualifying felonies, rather than a separate aggravation clause in each statute that defines a qualifying felony, has been deemed insufficient to change that analysis. That analysis cannot be extended, however, to characterize a civil sanction as an aggravated form of a serious criminal offense.

5. Respondents argue that the parallel civil and criminal actions at issue in these cases cannot be the "same proceeding" for purposes of the multiple-punishments doctrine. They argue that the record in *Kurth Ranch* reflected several parallel cases against the taxpayers and yet that did not preclude the Court's conclusion that one of those proceedings violated the Double Jeopardy Clause. See Ursery Br. 45; Arlt & Wren Br. 39-40. That point, however, was not briefed or argued in *Kurth Ranch*, and therefore that case "is a singularly unlikely source for a holding" (*Rutledge* v. *United States*, *supra*, slip op. 11 n.13) that parallel civil and criminal actions can never be the same proceeding for double jeopardy purposes. See *United States* v. *Shabani*, 115 S. Ct. 382, 386

(1994) ("[q]uestions which 'merely lurk in the record' are not resolved, and no resolution of them may be inferred"); see also *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952).

As a matter of doctrine, respondents' reliance on the formal existence of two proceedings is not sufficient to establish the existence of separate actions for double jeopardy purposes. See *United States* v. *DiFrancesco*, 449 U.S. 117 (1980) (upholding government sentencing appeals). Rather, as *DiFrancesco* indicates, a double jeopardy claimant must demonstrate an invasion of a legitimate expectation of finality in his sentence. A proceeding is not impermissibly successive for purposes of the multiple-punishments doctrine unless it defeats that expectation. Respondents have no reasonable argument that the second proceeding defeated any legitimate expectation of finality; nor can they sustain a claim that the abuse against which the Double Jeopardy Clause guards (*i.e.*, the institution of a second proceeding "because [the government] is dissatisfied with the sanction obtained in the first proceeding," *Halper*, 490 U.S. at 451 n.10) is present. Instead, they offer an array of policy arguments and "rigid, mechanical" tests (*Serfass* v. *United States*, 420 U.S. 377, 390 (1975)) that they believe will better serve the "purposes" of the Double Jeopardy Clause. See Arlt & Wren Br. 34-36; Ursery Br. 44-47. Those purposes, however, "are more likely to be honored by following longstanding practice than by following intuition." *United States* v. *Dixon*, 113 S. Ct. 2849, 2863 n.15 (1993). In challenging the institution of parallel civil and criminal proceedings, respondents have failed to offer a credible basis for departing from the practice that our Nation has followed for the last 200 years.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgments of the courts of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

APRIL 1996

☆ U. S. GOVERNMENT PRINTING OFFICE: 1996 405017 40107

(6)

Supreme Court, U.S.
FILED
FEB 23 1996
CLERK

No. 95-346

IN THE

Supreme Court of the United States

OCTOBER TERM 1995

UNITED STATES OF AMERICA, ***PETITIONER,***

v.

FOUR HUNDRED AND TWENTY FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET AL., ***RESPONDENT.***

ON WRIT OF CERTIORARI TO
THE TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF ADVOCATES FOR HIGHWAY AND AUTO SAFETY AND MOTHERS AGAINST DRUNK DRIVING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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February 23, 1996

28 pp

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Pursuant to Rules 33.1 and 37.3(b) of this Court, Advocates for Highway and Auto Safety ("Advocates") and Mothers Against Drunk Driving ("MADD"), respectfully moves the Court for leave to file a brief *amicus curiae* in the above entitled case.

CONSENT WITHHELD BY RESPONDENT

1. Counsel of record for Respondents has not replied to movant's letter requesting consent to the filing of a brief *amicus curiae*. Counsel for *amici* was informed that consent was withheld because respondents' counsel of record and his co-counsel failed to confer with each other regarding the request of *amici*. Petitioner, the United States of America, did consent through counsel to the filing of the *amicus* brief.

INTEREST OF *AMICI CURIAE*

2. *Amici* are non-profit organizations that seek to prevent alcohol-related motor vehicle crashes due to drunk driving. Advocates is a coalition of national safety, consumer, law enforcement organizations and insurance companies and insurance agents' associations. MADD is a national organization of persons who have been directly affected by motor vehicle crashes caused by drunk drivers. *Amici* organizations promote anti-drunk driving laws and regulations and have supported laws to suspend the driver's licenses of drunk drivers in order to protect public safety.

3. The issue presented in the case before the Court is whether civil proceedings in the context of property forfeiture constitute punishment under the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution.

This issue is of concern to *amici* because the same legal claim has been raised in state prosecutions for drunk driving. Persons charged with drunk driving offenses have asserted that separate civil proceedings to suspend a driver's license constitute punishment and, therefore, bar subsequent criminal prosecution by the state.

4. State courts have overwhelmingly determined that the suspension of a driver's license is not punishment within the meaning of the Double Jeopardy Clause. However, a decision to uphold the lower court decision in this case will be used to relitigate and overturn those state court decisions.

5. A case involving a double jeopardy claim based on driver's license suspension has been filed with the Court. *State of Maryland v. Jones*, 666 A.2d 128 (Md. 1995) *petition for cert. filed*, 64 U.S.L.W. 3510 (U.S. Jan. 11, 1996) (No. 95-1131).

6. *Amici* seek to assure that the Court is presented with the larger legal and social context in which the Court's decision will be made. It is expected that the litigants in the case before the Court will focus exclusively on Double Jeopardy protection in the context of property forfeiture. Only passing reference to the issues addressed in the brief of *amici* was made in the briefs filed in support of, and in opposition to, the *petition for certiorari* in this case.

CONCLUSION

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompanying *amicus* brief in the present case in support of the position of the Petitioner.

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Amici curiae respectfully submit this brief in support of the position of the Petitioner. Counsel for respondents have not consented to the filing of this brief.

STATEMENT OF INTEREST

Amici curiae, Advocates for Highway and Auto Safety ("Advocates") and Mothers Against Drunk Driving ("MADD"), file this brief in order to apprise the Court of a related issue that is at stake in this matter and to assure that the Court is fully informed of the potential implications of its decision in contexts beyond that of civil property forfeiture. The Court's decision in this case may have a great impact on many other aspects of life and social issues in the United States, most particularly the battle against the scourge of drunk driving on our nation's highways. The decision in this case is of critical importance to the safety of motorists throughout the nation.

Advocates is a broad-based alliance of safety, consumer, and law enforcement groups and insurers and insurance agents' organizations that promotes the adoption of highway safety legislation, standards, policies and programs at the federal and state levels in order to reduce deaths, injuries and economic costs associated with motor vehicle crashes. Advocates devotes a major portion of its organizational effort specifically to reducing the number of motor vehicle crashes that result from drivers operating their vehicles while under the influence of alcohol.[1] Advocates

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[1]State penal codes use either driving under the influence of alcohol or driving while intoxicated, or both, to describe drinking and driving offenses. For convenience the more general term of drunk driving will be used in this brief.

has endorsed and actively promoted state legislative initiatives intended to reduce the incidence of drunk driving and alcohol-related crashes including, administrative license suspension laws (ALS),[2] implied consent laws, and legislation that designates maximum levels of blood alcohol concentration.

MADD was founded to stop drunk driving and to assist the victims of this violent crime. For over a decade, MADD has been the preeminent private organization in the fight against the lethal combination of drinking and driving. MADD actively participates in public information programs, public and private studies, legislative initiatives, and law enforcement efforts aimed at reducing the incidence of alcohol-related crashes. MADD has actively supported administrative license suspension legislation in the many states, as well as other measures to reduce drunk driving and alcohol-related crashes, fatalities, and injuries, such as passage of alcohol *per se* laws, restrictions on the sale of beer kegs to those under 21 years of age, child endangerment legislation, and victims rights provisions. Substantive research as well as extensive experience have convinced MADD that license suspension is one of the most effective remedies to the social problem presented by drunk drivers.

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[2]The majority of state laws that administratively intermit driver's license privileges for drunk driving offenses use the terminology administrative license suspension or ALS, while a minority of state laws use the term administrative license revocation or ALR.

SUMMARY OF ARGUMENT

If the Ninth Circuit decision is upheld, its broad scope will affect diverse types of cases and have potentially serious social implications. Litigants in a wide variety of cases have relied on the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution, and this Court's precedents, to argue that any government restriction on personal action is a punishment. Double jeopardy has been raised in numerous cases involving activities subject to governmental regulation in the public interest. A sweeping decision in this case will be applied in distinctly different factual contexts and the Court's reasoning will not be limited to property forfeiture situations alone.

Particularly with respect to state regulation of the highways, defendants charged with drunk driving have claimed that any temporary suspension of a driver's license constitutes punishment that bars subsequent criminal prosecution. Because drunk driving is a serious health and safety problem, states have enacted license suspension laws in order to remove proven safety threats from the highway and to reduce the number of drunk driving incidents. The emerging consensus among state courts, including the unanimous agreement of the highest state courts to address the issue, is that state license suspension laws are remedial in nature and that license suspension is not punishment.

The Court has not yet ruled on the constitutionality of driver's license suspension in the double jeopardy context. The Court has, however, recognized the compelling state safety interest in prohibiting drunk driving and has sustained the constitutionality of a number of state anti-drunk driving statutes, including license suspension.

ARGUMENT

I. THE DECISION IN THIS CASE WILL AFFECT LEGAL ISSUES AND SOCIETAL ISSUES BEYOND PROPERTY FORFEITURE

The decision in this case will have far reaching implications that may affect numerous legal issues and areas of societal concern beyond the context of civil forfeiture proceedings. If the Court upholds a broad interpretation of the definition of punishment for purposes of the Fifth Amendment Double Jeopardy Clause, the ruling will spawn litigation in many other contentious areas and may undermine the public interest and public safety.

The Ninth Circuit Court of Appeals decision in *United States v. $405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), broadly concludes that all civil forfeitures under certain statutory provisions constitute punishment.[3] The decision prohibits a separate civil forfeiture proceeding subsequent to criminal prosecution, the situation actually presented in that case, but would also act prospectively to bar any criminal prosecution brought subsequent to a civil forfeiture proceeding. The Ninth Circuit's analysis relied on the finding that the civil forfeiture statutes are not entirely remedial but "serve[] at least in part to deter and punish guilty conduct." *Id.* at 1221. Litigants around the nation in non-forfeiture cases rely on precisely the same argument,

[3]18 U.S.C. § 981(a)(1)(A) and 21 U.S.C. § 81(a)(6). The concerns raised by *amici* in this brief are equally applicable to the issues in the companion case No. 95-345, *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995).

reasoning, and analysis as was incorporated in the Ninth Circuit decision.

The specific facts presented in civil forfeiture cases, as well as the history of civil forfeiture statutes, can be distinguished from other types of government actions and laws. In practice, however, the Court's prior decisions that have found certain civil proceedings constitute punishment under double jeopardy doctrine have been applied in cases involving a broad range of circumstances. The facts in *United States v. Halper*, 490 U.S. 435 (1989), involved government recovery of costs, and those in *Austin v. United States*, 113 S. Ct. 2801 (1993), involved civil forfeiture, and *Dept. of Rev. of Montana v. Kurth Ranch*, 114 S. Ct. 1937 (1994), dealt with a state tax on contraband. Although these cases all involved recovery of monetary claims under specific statutory schemes, the reasoning and language in these cases has been stretched by litigants to apply in cases where no compensatory costs, monetary charges, fines, levies, forfeitures, or taxes are at stake. In a plethora of cases in the federal and state courts litigants have sought to extend the reasoning and the wording of *Halper*, *Austin*, and *Kurth Ranch* to argue that any deprivation of property or restriction on personal conduct constitutes punishment so as to prohibit subsequent criminal prosecution. Litigants in federal prosecutions have already claimed that non-monetary restrictions on their conduct and ability to engage in business, professional and other activities amount to punishment within the meaning of the Double Jeopardy Clause. The ability of federal agencies to regulate violations of statutory standards in the public interest will be greatly restricted if any and all limitation on conduct is deemed to be punishment. Protection of the public interest in the generic

drug industry,[4] the banking industry,[5] commodity trading and stock brokerage,[6] real estate brokerage involving public housing,[7] medicare fraud,[8] and government contracting,[9] are among the fields of enterprise in which defendants have asserted that prior regulatory action, taken to protect the public, amounts to punishment within the meaning of the double jeopardy protection.

States also engage in civil and administrative actions which are separate from criminal prosecutions and are intended to protect the public interest. State authorities and

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[4]*Bae v Shalala*, 44 F.3d 489 (7th Cir. 1995) (debarment from industry activity was remedial where intent was to deter future misconduct by others, not solely to punish violators).

[5]*United States v. Hudson*, 14 F.3d 536 (10th Cir. 1994) (nonparticipation sanction solely designed to protect the integrity of the banking industry).

[6]*United States v. Furlett*, 974 F.2d 839 (7th Cir. 1992) (trading ban on a commodity broker intended to ensure the integrity of the markets).

[7]*United States v. Bizzell*, 921 F.2d 263 (10th Cir. 1990) (18-month suspension of real estate broker participation in public housing program held remedial).

[8]*Manocchio v. Kusserow*, 961 F.2d 1539 (11th Cir. 1992) (purpose of five year exclusion of doctor from medicare program participation is to protect public and is nonpunitive).

[9]*Steuart & Bro. v. Bowles*, 322 U.S. 398 (1944); *Janik Paving & Construction, Inc. v. Brock*, 828 F.2d 84 (2d Cir. 1987).

regulatory agencies have oversight of professional and business activities and licensing authority. In state courts, similar double jeopardy claims have been raised in an effort to prevent criminal prosecution when a civil or administrative action has been taken to discipline attorneys,[10] physicians,[11] chiropractors,[12] dentists,[13] and prison officers.[14] Of greatest importance to *amici* is the use of the Double Jeopardy Clause in the context of criminal prosecutions for drunk driving.

II. DRUNK DRIVERS ASSERT LICENSE SUSPENSION IS PUNISHMENT UNDER THE DOUBLE JEOPARDY CLAUSE

In case after case across the nation defendants have asserted that criminal prosecutions for drunk driving are prohibited where the state has previously suspended their driver's license for the same conduct in a separate

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[10]*Matter of Rabideau*, 306 N.W.2d 1 (Wis. 1981), *appeal dismissed*, 454 U.S. 1025 (1981).

[11]*Loui v. Board of Medical Examiners*, 889 P.2d 705 (Haw. 1995); *Alexander v. Louisiana Board of Medical Examiners*, 644 So.2d 238 (La. Ct. App. 1994); *Emory v. Texas State Board of Medical Examiners*, 748 F.2d 1023 (5th Cir. 1984).

[12]*Schillerstrom v. Arizona*, 885 P.2d 156 (Ariz. 1994).

[13]*Allen v. Louisiana State Board of Dentistry*, 603 So.2d 238 (La. Ct. App. 1992).

[14]*Ayars v. New Jersey Department of Corrections*, 597 A.2d 1084 (N.J. Super. Ct. 1991).

administrative proceeding. The contention that a driver's license suspension is punishment for the purposes of double jeopardy is predicated on interpretations of the Court's decisions in *Halper, Austin,* and *Kurth Ranch.* If this position were sustained, it could result in the elimination of license suspensions as an effective means of preventing drunk driving behavior. At worst, ALS laws would be significantly amended or repealed since state authorities would be unlikely to accept temporary license suspensions in lieu of the criminal prosecution of drunk drivers. At best, states would be forced to impose license suspensions only as part of criminal proceedings, a far less effective public safety measure. States should not have to face the dilemma of either protecting public safety or prosecuting drunk drivers, and the public should not have to be exposed to the increased safety threat that would exist if ALS laws were rendered less effective. The decision in this case will, therefore, have a carryover effect that may fan the flames of litigation in drunk driving cases and may ultimately affect the legitimacy of state ALS laws.

A. DRUNK DRIVING IS A SOCIETAL PROBLEM OF EPIDEMIC PROPORTIONS

Motor vehicle crashes are a major health and safety problem in the nation and in every state. Although the total number of annual highway fatalities have dropped from record high death tolls in the 1960s and early 1970s, each year more than 40,000 Americans still die and millions are injured, tens of thousands of whom sustain serious injuries. In the most recent year for compiled statistics, 1994, motor vehicle crashes resulted in 40,676 deaths and 3,215,000

bodily injuries.[15] While fatalities attributable to drinking and driving have diminished in recent years, over forty percent of the 1994 fatality total, 16,589 deaths, occurred in alcohol-related crashes. The vast majority of those deaths, 13,094, involved a drunk driver with a blood alcohol concentration (BAC) in excess of the state specified limit.[16] Even though drunk driving crashes cause fewer deaths than a decade ago, the numbers remain staggering and the cost to society in terms of human suffering, family disruption, medical resources, and financial burdens are enormous.

This Court is well aware of the brutal toll that drunk driving exacts from society and has repeatedly remarked on this problem. In a long line of cases, commencing with *Breithaupt v. Abram*, 352 U.S. 432 (1957) through *Michigan Dept of State Police v. Sitz*, 496 U.S. 444 (1990), the Court has recognized the danger posed by drunk drivers on American highways. In *Breithaupt* the majority wrote that "the increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield." In a case involving civil liability for motor vehicle crashes, Justice Blackmun pointed out that, as of 1969, the cumulative death toll from motor vehicle crashes exceeded the total number of deaths incurred in all U.S. wars. *Perez v. Campbell*, 402 U.S. 637, 657 (1971) (Blackmun, J., concurring in part and dissenting in part). "In making comparisons it must be kept in mind that

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[15] *Traffic Safety Facts 1994*, p. 15, Table 2, U.S. Department of Transportation (1995).

[16] *Id.*, p. 32, Table 13. State ALS laws set the level of blood alcohol at which license suspension is authorized at either 0.08% BAC (14 states) or 0.10% BAC (36 states).

nearly everyone is exposed to motor-vehicle accidents but relatively few are exposed to war deaths." *Id.* at 672 ("Appendix To Opinion of Blackmun, J."). In another case, the Court stated that "[t]he carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court, while not having the daily contact with the problem that the state courts have, has repeatedly lamented the tragedy." *South Dakota v. Neville*, 459 U.S. 553, 558 (1983) (citations omitted). Most recently, in *Michigan Dept of State Police v. Sitz*, the Court reiterated its continuing concern over the safety threat posed to the public by drunk drivers.

> No one can seriously dispute the magnitude of the drunken driving problem or the State's interest in eradicating it.
>
> * * * 'Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage.' 4 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 10.8(d), p. 71 (2d ed. 1987).

496 U.S at 451 (footnote and citations omitted). Because of the tragic proportions and devastating effect of drunk driving crashes, remedial measures such as license suspension have been adopted in all states.

B. LICENSE SUSPENSION LAWS PROTECT PUBLIC SAFETY

In order to reduce the incidence of drunk driving states have adopted a number of measures including the passage of ALS statutes. ALS permits state authorities to protect the

travelling public by administratively suspending the driver's license of any driver who operates their vehicle with a BAC percentage above the state maximum as determined by scientific testing.[17]

A driver's BAC level is determined either by a blood test or by the more common use of breathalyzer equipment. The Court has approved the use of blood tests to determine BAC levels. In *Breithaupt*, *supra*, a Fifth Amendment case that focused on the issue of self-incrimination, the Court reasoned that the interest of the individual in avoiding personal intrusion, such as a blood test, must be balanced against "the interests of society in scientific determination of intoxication, one of the great causes of the mortal hazards of the road." 352 U.S. at 439. Modern breathalyzer equipment is less invasive than blood tests and determines the percentage of alcohol in the blood stream from a sample of exhaled breath blown into a tube by the driver.

ALS laws have been enacted by all 50 states. Thirty nine states and the District of Columbia permit administrative license suspension prior to a hearing and all 50 states (and the District of Columbia) authorize the civil suspension or revocation of a license following a hearing. The Court has previously considered the widespread adoption and use of chemical tests to determine BAC some indication of the constitutional validity of state action. The opinion in *Breithaupt* referenced the fact that at that time 47 states had authorized chemical (blood) tests to determine BAC levels of

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[17]Suspensions are also authorized or mandated under implied consent laws which require drivers to submit to breathalyzer or blood testing when there is cause to believe that the driver is under the influence of alcohol.

drivers, 23 by state law and the remainder by regulation or state court approval. *Id.* at 436 n.3. The widespread adoption of such tests was viewed as some evidence that they were not offensive and did not violate constitutional protections. In *South Dakota v. Neville*, another case involving a challenge based on protection against self-incrimination, the Court stated that no constitutional violation occurs when appropriate procedural protections accompany the test. The Court concluded that a one year suspension of a license for refusing to take a blood-alcohol test "is unquestionably legitimate." 459 U.S. at 560.[18] Moreover, the Court has acknowledged that statutes which permit summary sanctions for the prompt removal of drunk drivers "contributes to the safety of public highways." *Mackey v. Montrym*, 443 U.S. 1, 18 (1978).

C. MOST STATE COURTS HAVE HELD LICENSE SUSPENSION IS NOT PUNISHMENT

The assertion of double jeopardy protection in the context of criminal prosecutions for drunk driving has been heard in the court of last resort in 14 states. Those courts have unanimously rejected the claim that driver's license suspension constitutes punishment for double jeopardy

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[18]In *South Dakota v. Neville*, *supra*, the Court engaged in a lengthy discussion of Fifth Amendment principles and while the issue was one of self-incrimination, and whether refusal to take the test could be used as evidence, it is noteworthy that in upholding the state statute the opinion makes no mention of any potential violation of double jeopardy, a companion protection.

purposes so as to prohibit a subsequent criminal prosecution.[19] The state courts have determined that the ALS laws at issue were either entirely or predominantly remedial in intent and effect and, therefore, did not represent punishment subject to double jeopardy analysis under *Halper*, *Austin*, and *Kurth Ranch*. In other states, intermediate appellate courts have also held that license suspension does not bar subsequent criminal prosecution.[20] A number of

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[19]*State of Nebraska v. Hansen*, 249 Neb. 177 (Neb. Jan. 26, 1996); *State of Minnesota v. Hanson*, No. C1-95-531, 1996 Minn. LEXIS 8 (Minn. Jan. 19, 1996); *State of Iowa v. Kocher*, No. 369/95-348, 1996 Iowa Sup. LEXIS 17 (Iowa Jan. 17, 1996); *State of Connecticut v. Hickham*, 235 Conn. 614 (Conn. Dec. 26, 1995); *State of Kansas v. Mertz*, 1995 Kan. LEXIS 149 (Kan. Dec. 8, 1995); *Luk v. Commonwealth*, 421 Mass. 415 (Mass. Nov. 27, 1995); *State of Idaho v. Talavera*, 1995 Ida. LEXIS 156 (Idaho Nov. 3, 1995); *State of North Dakota v. Zimmerman*, 539 N.W.2d 49 (N.D. 1995); *State ex. rel. Schwartz*, 904 P.2d 1044 (N.M. 1995); *State of Maryland v. Jones*, 666 A.2d 128 (Md. 1995); *State of Vermont v. Becker*, 1995 Vt. LEXIS 98 (Vt. Sept. 20, 1995); *State of New Hampshire v. Cassady*, 662 A.2d 995 (N.H. 1995); *State of Maine v. Savard*, 659 A.2d 1265 (Me. 1995); *State of Hawaii v. Higa*, 897 P.2d 928 (Haw. 1995).

[20]*State of Utah v. Arbon*, 1996 Utah App. LEXIS 4 (Utah Ct. App. Jan. 4, 1996); *State of Ohio v. Sanders*, 1995 Ohio App. LEXIS 5852 (Ohio Ct. App. Dec. 21, 1995); *Ex Parte James Martin Tharp*, 1995 Tex. App. LEXIS 3255 (Tex. Ct. App. Dec. 21, 1995); *People of the State of Illinois v. Dvorak*, 1995 Ill. App. LEXIS 926 (Ill. App. Ct. Dec. 13,

(continued...)

these appellate cases overruled lower trial and appellate court decisions that held a driver's license suspension was punishment so as to prohibit a separate criminal prosecution. Conflicting lower court decisions are still emerging and await resolution.[21] One state case has already reached this Court.[22]

The overwhelming body of developing state law in the area of license suspension has determined that driver's license suspensions do not constitute punishment. The state decisions are premised on the finding that ALS laws are remedial in nature since they are intended to protect public safety by removing from our highways, at least temporarily, drivers who have proven themselves to be a threat to public safety. *Amici* believe that these decisions are correct interpretations of the Court's prior decisions and double

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[20](...continued)
1995); *Marzolf v. Superior Court of the State of Arizona*, 1995 Ariz. App. LEXIS 258 (Ariz. Ct. App. Nov. 21, 1995); *Tench v. Commonwealth of Virginia*, No. 0773-95-2 1995 Va. App. LEXIS 786 (Va. Ct. App. Oct. 24, 1995); *Jackson v. State of Georgia*, 462 S.E.2d 802 (Ga. Ct. App. 1995); *State of Alaska v. Zerkel*, 900 P.2d 744 (Alaska Ct. App. 1995); *Baldwin v. Department of Motor Vehicles*, 42 Cal. Rptr.2d 422 (Cal. Dist. Ct. App. 1995).

[21]*State of Ohio v. Gustafson*, No. 94 C.A. 232 (Ohio Ct. App. June 27, 1995), *appeal argued*, Nos. 95-1466 and 95-1377 (Ohio Sup. Ct. Feb. 7, 1996); *State of Florida v. Reilly*, No. 94-6661MM10 (Broward County Ct. 1994).

[22]*State of Maryland v. Jones*, 666 A.2d 128 (Md. 1995) *petition for cert. filed*, 64 U.S.L.W. 3510 (U.S. Jan. 11, 1996) (No. 95-1131).

jeopardy analysis in *Halper*, *Austin*, and *Kurth Ranch*. *Amici* are concerned, nonetheless, that a decision in the civil forfeiture context should not give cause to reconsider the state court decisions in drunk driving cases.

III. EXERCISE OF TRADITIONAL STATE POLICE POWERS TO CURB DRUNK DRIVING IS CONSTITUTIONAL

The decisions of the Court have "traditionally accorded the states great leeway in adopting summary procedures to protect public health and safety." *Mackey v. Montrym*, 443 U.S. at 17. Decisions involving drunk driving situations repeatedly acknowledge that states have an important interest in highway safety and the removal of drivers who may pose a safety hazard. *Id.* at 18. Those cases establish that states have a legitimate and compelling interest in regulating traffic on state highways in order to protect the public. *Dixon v. Love*, 431 U.S. 105, 114 (1977). Thus, although the Court has not ruled on the specific issue of whether administrative license suspension constitutes punishment under the Double Jeopardy Clause, the Court has repeatedly upheld as constitutional the reasonable exercise of state police powers in the context of drunk driving cases.

In many precedents the Court has upheld the traditional exercise of state police powers to protect its citizens and other highway users. The Court has sustained reasonable blood test requirements[23] and implied consent statutes[24] from challenges based on Fifth Amendment protection

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[23]*Breithaupt v. Abram, supra.*

[24]*South Dakota v. Neville, supra.*

against self-incrimination. Similarly, the Court upheld ALS laws,[25] like those involved in the current state court decisions, and implied consent laws[26] despite assertions that those laws violated Fourteenth Amendment due process rights. Reasonably formulated state use of sobriety checkpoints was also held to be a constitutionally valid exercise of state police power despite a claim that such action violates Fourth Amendment strictures against unreasonable searches and seizures.[27]

These precedents, although relevant to other constitutional provisions, establish that states retain traditional police powers to regulate drivers on their highways especially in order to maintain public safety.

There is no reason to believe that the outcome should be different with respect to claims of Fifth Amendment Double

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[25]*Dixon v. Love*, *supra*. The Illinois statute "is designed to keep off the roads those drivers who are unable or unwilling to respect traffic rules *and the safety of others*." 431 U.S. at 114-15 (emphasis added).

[26]*Illinois v. Batchelder*, 463 U.S. 1112 (1983) (the interest of the States in depriving the drunk driver permission to continue operating an automobile is particularly strong); *Mackey v. Montrym*, *supra*.

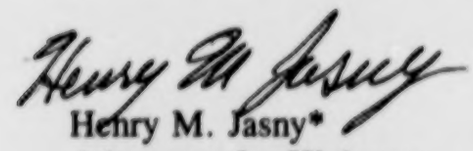
[27]*Michigan Department of State Police v. Sitz*, *supra*. The *Sitz* Court stated that while random stops of motor vehicles are not condoned, there is no doubt about the validity "'of roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others.'" 496 U.S. at 454, *quoting Delaware v. Prouse*, 440 U.S. 648, 663 n.26 (1979)).

Jeopardy rights in cases of license suspension to protect public safety on our highways.

CONCLUSION

Judgment should be entered for the petitioner.

Respectfully submitted,



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Date: February 23, 1996

FILED
FEB 23 1996
CLERK

(6) (7)

Nos. 95-345 and 95-346

In the

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,
Petitioner,

v.

GUY JEROME URSERY,
Respondent.

&

UNITED STATES OF AMERICA,
Petitioner,

v.

FOUR HUNDRED FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET AL.,
Respondent.

On Writ of Certiorari
To the United States Courts of Appeals
For the Ninth and Sixth Circuits

BRIEF OF THE STATE OF CONNECTICUT, 47 STATES, AND THE COMMONWEALTH OF PUERTO RICO AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

The amici states seek reversal of the decisions in the consolidated cases granted review. Those cases misinterpreted *United States v. Halper*, 490 U.S. 435 (1989); *Austin v. United States*, 113 S. Ct. 2801 (1993); and *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937 (1994), and thereby wrongfully expanded the Double Jeopardy Clause. Analysis similar to that employed by the Ninth and Sixth Circuits has already caused a deluge of double jeopardy litigation in far-reaching areas of traditional state criminal and civil regulation. This Court's decision will directly affect the states' ability to enforce their laws and avoid disruption to the orderly ousiness of criminal and civil adjudication in such varying areas as unemployment compensation, drivers licensing, prison discipline and prosecutions of all types of criminal offenses.

Moreover, although the decisions below construed the federal civil forfeiture statute, 21 U.S.C. § 881 (1994), every state has a civil forfeiture statute, many patterned after § 881.[1] Even states with statutory forfeiture patterns unlike the federal statute[2] have faced or will face double jeopardy challenges based on the decisions below. The states use civil forfeiture as an essential instrument in their efforts to remedy the consequences of criminal conduct which risks or

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[1] *E.g., In re One 1987 Toyota*, 621 A.2d 796, 798 (Del. Super. Ct. 1992) (Delaware statute "modeled closely upon" § 881); *Idaho Dept. of Law Enforcement By and Through Cade v. Real Property Located in Minidoka County*, 885 P.2d 381, 383 (Idaho 1994) (Idaho statute "virtually identical to" § 881).

[2] *E.g.*, Ariz. Rev. Stat. Ann. §§ 13-4301 to 13-4315 (Supp. 1994); Kan. Stat. Ann. §§ 65-4135 to 65-4175 (1992). *See also* Commission Reform Act of 1994, drafted by the President's Commission on Model State Drug Laws.

harms the public health or safety. Forfeiture has proven its effectiveness in disrupting criminal enterprises, removing essential materiel, preventing capitalization of illegal business and limiting the economic power and personal enjoyment derived from illegal proceeds. The decisions of the courts below would severely limit the ability of the states to use that vital tool.

SUMMARY OF ARGUMENT

1. The Ninth and Sixth Circuits misapplied and expanded this Court's double jeopardy jurisprudence. Relying on dictum in *United States v. Halper*, 490 U.S. 435 (1989), the courts below held that a civil sanction which is not solely remedial cannot be imposed in addition to a criminal punishment. Such an interpretation conflicts both with the actual holding of *Halper* and with the later decision in *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 2801 (1993). Those cases held that civil sanctions which cannot "fairly be characterized as remedial, but *only* as a deterrent or retribution," are "punishment" for double jeopardy purposes. *Halper*, 490 U.S. at 448-449 (emphasis added); *Kurth Ranch*, 114 S. Ct. at 1952. Thus, the Ninth and Sixth Circuits turned the inquiry on its head. Those courts based their decisions on *Austin v. United States*, 113 S. Ct. 2801 (1993), which was not a double jeopardy case but instead addressed whether a federal civil forfeiture statute can be deemed punishment so as to come within the term "fine" in the Eighth Amendment's Excessive Fines Clause.

The Ninth and Sixth Circuits also erred by failing to assess the nature of the sanction and its remedial goals. This Court in *Halper* and *Kurth Ranch* clearly stated that double

jeopardy analysis requires a "particularized assessment" of each sanction and its purposes. *Halper*, 490 U.S. at 448; *Kurth Ranch*, 114 S. Ct. at 1948. The courts below ignored that requirement, holding that all forfeitures are punishment for purposes of double jeopardy and therefore invalidating the entire proceeding.

2. Litigants and courts applying the improper analysis employed by the Ninth and Sixth Circuits have produced a flood of double jeopardy litigation in state courts. Civil claimants and criminal defendants have challenged penalties and sanctions in areas in which states have traditionally exercised legitimate regulatory power, including drivers licensing, professional licensing, business regulation and prosecutions of crime. These claims are crippling the ability of the states to pursue civil and criminal justice in a timely and orderly manner. Affirmation of the decisions below would continue this disruption of states' administration of their civil and criminal laws and destroy many state regulatory programs.

3. With respect to forfeiture specifically, under a correct application of *Halper* and *Kurth Ranch*'s double jeopardy jurisprudence, forfeiture of the proceeds of a crime is always remedial and therefore outside the Double Jeopardy Clause. Such forfeiture merely removes illegal profits to which the possessor has no lawful property right and prevents use of illegally gained assets to expand criminal activity. Forfeiture of assets which facilitate crimes is similarly remedial because it disrupts drug trafficking by taking away the tools that a drug trafficker needs to ply his trade.

4. Finally, although the decisions below can be reversed in accord with the actual holding of *Halper*, if this Court concludes that the Ninth and Sixth Circuits correctly interpreted *Halper*, the amici states believe that *Halper* should be reconsidered and overruled. Applying the Double Jeopardy Clause as the courts below did does not further the Clause's aims, and would continue to create judicial confusion over many difficult issues, resulting in unfair and inconsistent results and vexatious litigation.

ARGUMENT

IMPOSITION OF BOTH CIVIL FORFEITURE, OR OTHER CIVIL SANCTIONS, AND A CRIMINAL CONVICTION AND SENTENCE DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Double Jeopardy Clause has been held to prohibit "three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *United States v. Halper*, 490 U.S. at 440. Until *Halper*, it was generally understood that the Double Jeopardy Clause applied only to criminal prosecutions or those few proceedings labeled civil, but deemed to be in fact criminal and thus to require the constitutional safeguards provided to criminal defendants. *See Helvering v. Mitchell*, 303 U.S. 391, 399 (1938) (risk to which the Clause refers is not present in proceedings that are not essentially criminal); *Breed v. Jones*, 421 U.S. 519, 528 (1975) ("In the

constitutional sense jeopardy describes the risk that is traditionally associated with a criminal prosecution."); *United States v. Ward*, 448 U.S. 242 (1980); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). Thus, there was a fairly clear distinction between criminal and civil penalties. Criminal penalties were those which resulted from criminal or "criminal-like" proceedings. *See* Linda S. Eads, *Separating Crime from Punishment, The Constitutional Implications of United States v. Halper*, 68 Wash. U. L.Q. 929 (1990).

In *Halper*, this Court departed from that understanding of double jeopardy jurisprudence and held that a sanction imposed in a civil proceeding could be deemed punishment for purposes of double jeopardy. The Court held that some civil sanctions, or portions thereof, serve only deterrent or retributive purposes because they are not rationally related to remedying the government's damages. Relying solely on the multiple punishment prong of double jeopardy analysis, the Court then determined that in certain very limited situations such sanctions are punishment for double jeopardy purposes and cannot stand after the imposition of a criminal punishment. *Halper*, 490 U.S. at 449. However, the court stated that both such punishments could be imposed in a single proceeding. *Halper*, 490 U.S. at 450.

The courts below misapplied *Halper* and two subsequent cases: *Austin v. United States*, 113 S. Ct. 2801 (1993), an Eighth Amendment case; and *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937 (1994). Because other litigants have adopted their analysis, states have been inundated with meritless double jeopardy claims. This has

wrongfully threatened enforcement of an array of civil sanctions including the civil forfeiture sanction. This Court should reaffirm that civil sanctions implicate the Double Jeopardy Clause in only the rarest of proceedings.

A. The Sixth and Ninth Circuits Misapplied and Expanded The Double Jeopardy Doctrine of *Halper* and *Kurth Ranch*.

The two Courts of Appeal below misconstrued the double jeopardy jurisprudence enunciated in *Halper*, and expanded it beyond the bounds previously delineated in at least three crucial ways.

First, the courts below unduly expanded the concept of "punishment" for a double jeopardy assessment of civil sanctions. They did so by relying on *dictum* in *Halper* and ignoring its actual holding. Both courts held that a sanction which has any deterrent or retributive purpose or effect, regardless of its overall remedial goals, must be considered punishment. The courts relied on the following dictum in *Halper*: "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Halper*, 490 U.S. at 448.

The actual holding of *Halper*, however, was to a very different effect:

> We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may

> not be subjected to an additional civil sanction to the extent that the second sanction *may not fairly be characterized as remedial, but only as a deterrent or retribution.*

490 U.S. at 448-449 (emphasis added). Thus a civil sanction implicates double jeopardy if it can "only" be characterized as a deterrent or retribution and has no remedial function.[3]

Instead of following this clear teaching from the double jeopardy cases, the Ninth and Sixth Circuits relied on the use of the "solely remedial" language in *United States v. Austin*, 113 S. Ct. at 2812. However, *Austin* involved a different constitutional provision from *Halper* and accordingly used a different analysis. *Austin's* excessive fines analysis characterized all forfeitures, including purely remedial ones, as punishment for purposes of the term "fine" in the Excessive Fines Clause. 113 S. Ct. at 2812 n. 14. Moreover, that was only a threshold determination, and a remand was necessary to determine if the fine was excessive. *Halper*, by contrast, did not characterize remedial sanctions as punishment, and its determination that a sanction was punishment decided the ultimate issue and invoked the

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[3] In *Kurth Ranch*, this court reiterated the *Halper* holding, with no reference to the "solely remedial" dictum. 114 S. Ct. at 1945. *See also Kurth Ranch*, 114 S.Ct. at 1952 (Rehnquist, C.J., dissenting) (proper inquiry is whether a sanction "can *only* be explained as serving a punitive purpose.") (emphasis added); *Id.* at 1953 (O'Connor, J., dissenting) ("Our double jeopardy cases make clear that a civil sanction will be considered punishment to the extent that it serves *only the purposes of retribution and deterrence, as opposed to furthering any nonpunitive objective.*") (emphasis added).

Double Jeopardy Clause. Thus, *Austin* cannot support the lower courts' expansion of the double jeopardy doctrine.

Second, the two circuit courts ignored *Halper*'s direction to undertake, for double jeopardy analysis, a "particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve." *Halper*, 490 U.S. at 448. *See also Kurth Ranch*, 114 S. Ct. at 1948 (specific analysis that applies to determine whether a sanction is punishment for a double jeopardy claim varies depending on the sanction under consideration). Such a "rule . . . of reason" permits application of double jeopardy principles only in the "rare case" where the civil penalty in application bears no rational relation to a remedial goal so that it "*in fact* constitutes a second punishment." *Halper*, 490 U.S. at 446, 449-50.

Rather than following this mandate, and determining the nature of the remedial goals of the forfeiture sanction, the courts below relied on the Eighth Amendment analysis of *Austin* to hold that all forfeitures are punishment. That reliance was unfounded. *Austin* did not change the *Halper* rule by adopting a categorical approach to the concept of punishment for forfeiture or any other sanction. In fact, *Austin* acknowledged the individual nature of the *Halper* double jeopardy inquiry. *Austin*, 113 S. Ct. at 2812 n.14. It is true that in addressing the Eighth Amendment definition of the term "fine," *Austin* focused on the federal civil forfeiture statute as a whole. However, that inquiry was only the first step in the Eighth Amendment analysis, and the Court remanded the case for a determination of whether the particular forfeiture at issue was remedial or non-remedial and therefore "excessive." *Id.*, 113 S. Ct. at 2812 n.14.

Had the court intended the categorical approach to forfeitures used by the Ninth and Sixth Circuits, there would have been no need for a remand.

Third, the courts below erred in dismissing the second sanction rather than amending the civil sanction to comply with double punishment limitations set out in *Halper*. Blanket dismissal leads to the anomalous circumstance that an entire remedy is negated if it is a single dollar over the level at which a remedial sanction becomes punitive. Such a result conflicts with *Halper*'s directive to assess so much of the potential civil judgment as is not punitive, after a particularized view of the remedial goals of the civil action involved and the circumstances of the specific case.

In sum, contrary to the decisions below, punishment occurs only in the "rare case" where there is an egregiously excessive civil sanction that is not reasonably related to a remedial purpose. Even then, the entire sanction need not necessarily be barred. Only that portion which is unrelated to the remedial goals may be considered punishment.[4]

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[4] The Ninth Circuit also mistakenly held that coordinated, parallel civil and criminal proceedings could never be considered the same proceeding so as to comply with *Halper*'s teaching that there is no double jeopardy violation if the civil and criminal sanctions, no matter their extent, are applied in the same proceeding. The Sixth Circuit did not adopt a categorical rule, but mistakenly determined that in the case before it there was insufficient evidence of coordination of actions to find one proceeding. Neither court used the correct analysis. Parallel civil and criminal proceedings for the same conduct may be deemed one proceeding for double jeopardy purposes so long as the timing of the actions does not permit repeated attempts to achieve in a second action what the government did not accomplish in the first. This kind of oppressive abuse by an initially dissatisfied government is at the heart of

B. The Double Jeopardy Analysis Employed In The Decisions Below Has Created Havoc With The States' Efforts To Perform Their Traditional Role In The Prosecution Of Crime And The Regulation Of Civil Activity.

Reasoning similar to that of the Ninth and Sixth Circuits has produced novel and vexatious double jeopardy litigation in state courts across the nation. In order legitimately to address prohibited conduct, the states increasingly rely on civil sanctions such as taxes, forfeitures, drivers license suspensions, professional disciplinary sanctions and exclusion from participation in public programs. Many of these civil sanctions are imposed for conduct that is also subject to criminal prosecution and punishment. However, double jeopardy analysis such as that used by the Ninth and Sixth Circuits casts into doubt the authority of the states to apply civil sanctions in addition to

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the double jeopardy concern. Absent that potential, there is only one jeopardy. *See United States v. Millan*, 2 F.3d 17 (2d Cir. 1993), *cert. denied, sub nom., Bottone v. United States*, 114 S. Ct. 922 (1994); *United States v. One Single Family Residence Located at 18755 North Bay Road, Miami*, 13 F.3d 1493 (11th Cir. 1994). The amici, however, will leave to the United States to argue the facts of the particular proceedings involved here.

In addition, the Sixth Circuit also erred in finding that the forfeitures and the criminal convictions were based on different offenses under the traditional double jeopardy test of *Blockburger v. United States*, 284 U.S. 299 (1932), which requires a determination of whether each "offense" requires proof of an element not included in the other. *See also United States v. Dixon*, 113 S. Ct. 2849 (1993). Because that determination is necessarily based on the specific statutory elements involved in a particular case, the amici states will not argue that issue here, but support the United States in its argument.

criminal prosecution. Furthermore, that kind of double jeopardy reasoning has disrupted the orderly process of criminal justice by leading either to dismissals of criminal charges following a civil sanction or to interlocutory appeals of the denial of those dismissals, regardless of the facial frivolity of the claim.

The states have faced challenges to criminal prosecutions and civil sanctions in cases ranging from homicide to sexual assaults to disqualification from public office to professional discipline. For example, most, if not all, states have faced challenges to the criminal prosecution of drunk driving charges because of prior drivers license suspensions for the same conduct. In Connecticut, a trial court dismissed such a prosecution based on its reading of the *Halper* line of cases. Analyzing the double jeopardy issue much as the Ninth and Sixth Circuits did here, the trial court held that drivers license suspension could not be deemed "solely" remedial and therefore constituted "punishment," barring a criminal punishment for the same conduct. *State v. Hickam*, No. MV94 618025, 1995 Conn. Super. LEXIS 1215 (Apr. 20, 1995), *rev'd*, No. 15256, 1995 Conn. LEXIS 432 (Dec. 26, 1995). The Connecticut Supreme Court, analyzing the issue differently, held the license suspension remedial rather than punitive and reinstated the prosecution. *State v. Hickam*, No. 15256, 1995 Conn. LEXIS 432 (Dec. 26, 1995). By contrast, an Ohio Court of Appeals agreed with a defendant's double jeopardy reasoning and refused to reinstate the drunk driving

prosecution. *State v. Gustafson*, No. 94 C.A. 232, 1995 Ohio App. LEXIS 2790 (Jan. 27, 1995).[5]

Some state trial courts have dismissed criminal prosecutions after imposition of a civil sanction. *See, e.g., State v. Hickam*, 1995 Conn. Super. LEXIS 1215; *State v. Hanson*, Nos. C1-95-531, C5-95-564, 1996 Minn. LEXIS 8 (Jan. 19, 1996) (reversing trial court); *Small v. Commonwealth*, 402 S.E.2d 927 (Va. Ct. App. 1991) (en banc); *State v. Schnittgen*, No. 95-384 (Mont. filed Aug. 21, 1995) (appeal pending from district court's dismissal of felony charges, holding prior termination of the defendant's employment as deputy sheriff was punishment for double

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[5] The *Gustafson* case is currently on appeal to the Ohio Supreme Court. *See Gustafson*, 73 Ohio St. 3d 1427 (Ohio 1995). A different Ohio appellate court came to a contrary conclusion and reinstated the prosecution. *State v. Miller*, No. 2-94-32, 1995 Ohio App. LEXIS 1971 (May 12, 1995), *appeal allowed*, 655 N.E.2d 185 (Ohio 1995).

For other challenges to drunk driving prosecutions following suspension of license, *see, e.g., State v. Zerkel*, 900 P.2d 744 (Alaska Ct. App. 1995); *State v. Nichols*, 819 P.2d 995 (Ariz. Ct. App. 1991); *Freeman v. State*, 611 So. 2d 1260 (Fla. Dist. Ct. App. 1992), *cert. denied*, 114 S. Ct. 415 (1993); *State v. Higa*, 897 P.2d 928 (Haw. 1995); *State v. Maze*, 825 P.2d 1169 (Kan. Ct. App. 1992); *Butler v. Department of Pub. Safety & Corrections*, 609 So. 2d 790 (La. 1992); *State v. Jones*, 666 A.2d 128 (Md. 1995), *petition for cert. filed*, 64 U.S.L.W. 3510 (U.S. Jan. 11, 1996) (No. 95-1131); *State v. Savard*, 659 A.2d 1265 (Me. 1995); *State v. Hanson*, Nos. C1-95-531, C5-95-564, 1996 Minn. LEXIS 8 (Jan. 19, 1996); *State v. Young*, 530 N.W.2d 269 (Neb. Ct. App. 1995); *State v. Cassady*, 662 A.2d 955 (N.H. 1995); *State v. Tench*, 462 S.E.2d 922 (Va. Ct. App. 1995); *State v. Strong*, 605 A.2d 510 (Vt. 1992).

jeopardy purposes).[6] In other cases, courts have invalidated a civil sanction following a criminal conviction for the same conduct. *See, e.g., Kvitka v. Board of Registration in Medicine*, 551 N.E.2d 915 (Mass.), *cert. denied*, 498 U.S. 823 (1990) (vacating fine imposed by medical licensing board following criminal conviction for illegal drug dispensing).

Thus, the reach of the double jeopardy analysis, as expanded in the two cases granted review, extends far beyond the civil forfeiture arena. No sooner do state attorneys believe they have seen the most extensive and frivolous permutation of these double jeopardy claims than imaginative civil claimants and criminal defendants present new challenges. The spectrum includes: claims that professional disciplinary actions bar criminal prosecution and vice versa;[7] claim that conviction for unregistered firearms bars revocation of state liquor license for same conduct;[8] claims that prison discipline for violent conduct bars

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[6] *Halper* involved a civil penalty imposed after a criminal prosecution. In *Kurth Ranch* this Court noted that it was not deciding the case in which the criminal prosecution follows the civil sanction. *Kurth Ranch*, 114 S.Ct. at 1947 n.21.

[7] *Schillerstrom v. State*, 885 P.2d 156 (Ariz. Ct. App. 1994), *cert. denied*, No. CV-94-0396-PR (Ariz. Dec. 20, 1994) (revocation of chiropractic license); *People v. Marmon*, 903 P.2d 651 (Colo. 1995) (attorney discipline); *Loui v. Board of Medical Examiners*, 889 P.2d 705 (Haw. 1995) (discipline of medical doctor).

[8] *Roach Enters., Inc. v. License Appeal Comm'n*, Nos. 1-95-1446, 1-95-1555, 1996 Ill. App. LEXIS 9 (Jan. 12, 1996).

subsequent prosecution for assault or homicide;[9] challenge to revocation of business license to operate health spa following plea of nolo contendere to sexual offense;[10] challenge to negligent homicide prosecution after fine for traffic violation resulting in death;[11] claims that prior criminal conviction precludes application of statutory or state constitutional bar on candidacy for public office;[12] claims that disqualification from public benefits because of criminal conduct bars subsequent criminal prosecution;[13] claims that school expulsion for criminal misconduct bars delinquency adjudication;[14] challenge to motor vehicle department assessment of "points" on driving record after conviction for

[9] *State v. Walker*, 646 A.2d 209 (Conn. App. Ct.), *appeal denied*, 648 A.2d 159 (Conn. 1994); *State v. McKenzie*, No. C3-95-1258, 1996 Minn. LEXIS 10 (Jan. 19, 1996).

[10] *Moser v. Richmond County Bd. of Comm'rs*, 428 S.E.2d 71 (Ga. 1993).

[11] *Purcell v. United States*, 594 A.2d 527 (D.C. 1991).

[12] *McIntyre v. Miller*, 436 S.E.2d 2 (Ga. 1993); *Taylor v. State Election Bd.*, 616 N.E.2d 380 (Ind. Ct. App. 1993).

[13] *State v. Varney*, No. CA94-12-013, 1995 Ohio App. LEXIS 2822 (July 3, 1995); *State v. Millett*, No. And-95-166, 1996 Me. LEXIS 7 (Jan. 5, 1996); *State v. Duerr*, No. 14871, (Conn. App. Ct. filed December 29, 1995).

[14] *In re Dandridge*, 614 So.2d 129 (La. Ct. App.), *cert. denied*, 616 So. 2d 684 (La. 1993); *In re Gila County Juvenile Delinquency Action*, 816 P.2d 950 (Ariz. Ct. App. 1991).

motor vehicle offenses;[15] and claim that denial of accrued vacation benefits after public employment termination due to crime violates double jeopardy because of previous conviction for the crime.[16]

The doctrine that civil sanctions can be deemed punishment for double jeopardy purposes has even led to claims in cases involving only civil adjudication. In *Ward v. Department of Pub. Safety and Correctional Servs.*, 663 A.2d 66 (Md. 1995), an employee was disciplined for misconduct at his job. Subsequently, he was discharged. He claimed, pursuant to *Halper* and its progeny, that the prior suspension was a form of punishment which constituted an "administrative" double jeopardy bar to the subsequent discharge.[17]

Even more surprising, the *Halper* doctrine has been invoked in private lawsuits. Defendants previously convicted of crimes have claimed that in private lawsuits for damages caused by the criminal conduct, punitive damages are barred under double jeopardy rules. *See Whittaker v. Dail*, 567 N.E.2d 816 (Ind. Ct. App. 1991), *rev'd on other grounds*, 584 N.E.2d 1084 (Ind. 1992); *Jines v. Seiber*, 549 N.E.2d 964 (Ill. App. Ct. 1990). In Oregon, a trial court dismissed

[15] *No Illegal Points, Citizens for Drivers Rights, Inc. v. Florio*, 624 A.2d 981 (N.J. Super. Ct. App. Div.), *cert. denied*, 634 A.2d 526 (N.J. 1993).

[16] *Stuart v. Department of Social and Rehabilitation Servs.*, 846 P.2d 965 (Mont. 1993).

[17] At oral argument in the appeal, the claimant abandoned the constitution as a basis for his claim. Nevertheless the court explained why his claim was meritless. *Ward*, 663 A.2d at 69.

a prosecution for shoplifting because the defendant had already been "punished" by paying restitution to the store owner in a civil suit. *State v. Reetz*, No. CA A89387 (Ore. Ct. App. filed July 24, 1995).

Finally, at least one court has extended the distorted, expansive reading of *Halper* to employ the double jeopardy analysis even where there was no prior punishment, but the claimant had been subjected to a prior proceeding. Thus, in *Crump v. Alabama Alcoholic Beverage Control Bd.*, No. 2940412, 1995 Ala. Civ. App. LEXIS 670 (Dec. 1, 1995), the court found that a civil fine was an additional penalty barred by the double jeopardy clause even though the plaintiff had previously been acquitted of the crime and therefore not punished previously.

The cases cited above are only the tip of the iceberg. In a decision filed in January, 1995, the New York Supreme Court of Kings County reported that a computer search indicated that at least 147 state decisions had discussed or cited the *Halper* rule. *District Attorney of Kings County v. Iadarola*, 623 N.Y.S.2d 999 (N.Y. Sup. Ct. 1995). These challenges to states' civil and criminal proceedings are increasing at an alarming rate.[18] The doctrine described by this Court in *Halper*, 490 U.S. at 449, as only for the "rare case" has become the claim for the ordinary case.

Most of these challenges, even when accepted at the trial level, have been rejected by state appellate courts. For

[18] Another source of potentially crippling litigation is habeas corpus claims of state prisoners in both state and federal courts seeking to vacate criminal convictions due to prior civil sanctions.

the most part, the states have avoided a categorical approach to the question of civil sanctions, instead considering the particular sanction involved and restricting a finding of double jeopardy to the "rare case." Moreover, the state courts have looked to see if a civil sanction may "fairly be characterized as remedial" rather than finding punishment whenever there is any deterrent or retributive effect or goal.[19] Nevertheless, the temporal and monetary resources devoted to defending the state's authority to pursue its legitimate civil and criminal goals has been crippling. Many states allow an interlocutory appeal when a claim of double

[19] *See, e.g., People v. Dvorak*, 658 N.E.2d 869 (Ill. App. Ct. 1995) (upholding denial of motion to dismiss DUI prosecution, and stating:

> We do not read the Supreme Court cases as requiring an inflexible test which automatically classifies a sanction as punishment unless it can fairly be said *solely* to serve a remedial purpose. . . The Court [in *Kurth Ranch*] clearly recognized that civil sanctions may have some incidental deterrent or punitive effect without necessarily being 'punishment' for double jeopardy purposes. Although the *Halper* Court at one point employed somewhat expansive language ('fairly said solely to serve a remedial purpose'). . .that language does not comprise the holding or the test established in *Halper* and in subsequent cases. . . . *Id.* at 874) (emphasis in original);

See also State v. Tench, 462 S.E.2d 922, 924 n.4 (Va. Ct. App. 1995) ("This is not the 'rare case' described by *Halper*. The sanction here is not monetary and is not designed to compensate the government for out-of-pocket losses. Its remedial purpose is not to compensate, but to protect the public from intoxicated drivers and the accidents they cause.").

jeopardy is asserted to bar a criminal prosecution.[20] Thus, the orderly process of justice is delayed even when the double jeopardy claims are ultimately rejected.

If the Court affirms the courts below, this drain on state judicial resources would multiply dramatically. It would be virtually impossible to find any civil sanction "solely" remedial, as all such sanctions have some deterrent or retributive effect or goal. The violent prisoner would escape prosecution for his crimes based on the same erroneous analysis that caused the Ninth and Sixth Circuits to bar both forfeiture and prosecution. Instead, double jeopardy principles should return to the intent of this Court's decision in *Halper* and be applied extremely narrowly in the civil sanction area. This Court's decision must be carefully crafted to avoid disastrous and unintended results to the states' authorized civil sanctioning power.

C. Contrary To The Decisions Below, Under This Court's Double Jeopardy Doctrine as Enunciated in *Halper* and *Kurth Ranch*, Forfeitures Are Punishment Only In The "Rare Case."

Part B, *supra*, demonstrates how an erroneously expansive reading of *Halper* is having a deleterious effect on an array of civil sanctions. The most immediate negative effect of the decisions of the courts below is on the forfeiture

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[20] *See, e.g., State v. Davis*, 903 P.2d 940 (Utah Ct. App. 1995) (interlocutory appeal from denial of motion to dismiss criminal prosecution following forfeiture of vehicle); *State v. Aparo*, 614 A.2d 401, 403 n.4 (Conn. 1992), *cert. denied*, 507 U.S. 972 (1993) (double jeopardy claim exception to final judgment rule for appellate review, citing *Abney v. United States*, 431 U.S. 651 (1977)).

sanction. The courts below held that civil forfeitures, categorically, are "punishment" for purposes of applying the Double Jeopardy Clause. This directly conflicts with *Halper*'s holding that civil sanctions are "punishment" only in the rare case. Moreover, this court in *Austin* recognized that some types of forfeiture are remedial and thus fall outside the Double Jeopardy Clause.

The courts below also neglected to assess the particular remedial purposes of forfeiture actions. The fine in *Halper* was intended to compensate the government for its direct losses and expenses incurred as a result of the false claims filed by Halper and the ensuing litigation. In the case of forfeiture, there are costs to society resulting from illegal drug marketing that are not assessable in financial terms, but are nonetheless real.[21] And the remedial goal is to remove the harmful assets from society to prevent future damage. Moreover, the illegal narcotics industry is an entire underground economy in which no one acts alone. Every

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[21] Many states, recognizing the nature of these costs, have statutorily allocated the proceeds of civil forfeiture actions to remedial compensatory goals such as funding drug law enforcement, drug abuse education and gang prevention programs. *See, e.g.*, Conn. Gen. Stat. § 54-36i(c) (1994) (allocating forfeiture of drug assets to fund of which 70% goes to local and state police for drug education and detection and investigation of drug crime and gang violence, 20% to the department of health for substance abuse treatment and education, and 10% for the prosecution of drug related crimes by the division of criminal justice); Or. Rev. Stat. tit. 16, ch. 166, § 10(1)(c) (1993) (allocating funds to enforcement of drug laws, drug intervention, treatment and education programs and prohibiting use for construction, expansion or maintenance of buildings and employment positions previously funded out of non-forfeiture proceeds); Ariz. Rev. Stat. Ann. §§ 13-4311(I),(N) (1995) (allocating forfeiture proceeds as a first priority to compensate the victim of the crime with which the property was associated).

participant is tied to others in the enterprise. The costs of investigating and prosecuting an individual defendant will inevitably include costs attributable to investigation and prosecution of many others as well. Therefore, it is fair to view broadly the costs of the drug business in assessing the remedial nature of civil forfeiture.

1. Forfeiture of proceeds of a crime is always remedial.

In *Austin*, the Court recognized that forfeiture of contraband is remedial. The Court cited *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984), where contraband was forfeited, as an example of cases where the forfeiture could properly be "characterized as remedial because it removes dangerous or illegal items from society." *Austin*, 113 S. Ct at 2811. Proceeds of criminal activity, often of illegal narcotics trafficking, are the functional equivalent of the contraband they replace. Forfeiture of criminal proceeds serves to remove the illegally obtained assets from society and to prevent their reinvestment in the expansion of harmful, illegal activity. Thus, forfeiture of proceeds is remedial under *Austin*, because it does in fact remove dangerous items from society. *Id.* at 2811.[22]

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[22] In general, this Court has upheld against double jeopardy challenges the imposition of criminal punishment and the *in rem* forfeiture of property associated with the crime. *See One Lot of Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232 (1972); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984); *Various Items of Personal Property v. United States*, 282 U.S. 577 (1931); *But see Coffey v. United States*, 116 U.S. 436 (1886) (striking down forfeiture following acquittal of crime on grounds difficult to determine but appearing to be collateral estoppel principles, with no specific mention of the Double Jeopardy Clause). *Coffey* was disapproved in

Furthermore, forfeiture of proceeds, like that of contraband, takes property to which the possessor has no lawful right. In *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989), this Court upheld the forfeiture of proceeds of drug trafficking intended to pay for a criminal defendant's legal fees. The Court reasoned that the money was not rightfully the defendant's, and, therefore, forfeiture did not violate his Sixth Amendment right to counsel of his choice.[23] *Cf. Rex Trailer Co. v. United States*, 350 U.S. 148, 153-54, n.6 (1956) (illegal proceeds from fraudulent transaction with the government characterized as "unjust enrichment"). Similarly, the forfeiture of assets which do not legally belong to the possessor is not punishment. It merely places the offender back in the position he enjoyed prior to his criminal activities. Moreover, the forfeiture of drug proceeds will always be proportional to the amount of drugs sold, and therefore proportional also to the harm to society. *United States v. Tilley*, 18 F.3d 295 (5th Cir.), *cert. denied*, 115 S. Ct. 574 (1994).

Although the Ninth Circuit failed to understand the remedial nature of proceeds forfeiture, the same mistake was not made by other circuit courts and many state courts. *See, e.g., United States v. Tilley*, 18 F.3d 295; *United States v. $184,505.01 in United States Currency*, 72 F.3d 1160 (3d Cir. 1995); *United States v. Alexander*, 32 F.3d 1231, 1236 (8th Cir. 1994) (proceeds forfeiture not punishment for

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United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984).

[23] The proceeds of criminal activity are analogous to the money taken in a bank robbery. *Caplin & Drysdale*, 491 U.S. at 626. It would be absurd to find that forfeiture of the proceeds of bank robbery bars a criminal prosecution or vice versa.

purposes of the Eighth Amendment Excessive Fines Clause); *District Attorney of Kings County v. Iadarola*, 623 N.Y.S.2d 999 (N.Y. Sup. Ct. 1995); *Idaho Dep't. of Law Enforcement By and Through Cade v. Real Property Located in Minidoka County*, 885 P.2d 381, 383 n.5 (Idaho 1994). Those courts correctly held that forfeiture of proceeds is not punishment. As the Fifth Circuit stated:

> When . . . the property taken by the government was not derived from lawful activities, the forfeiting party loses nothing to which the law ever entitled him. . . . The possessor of proceeds from illegal drug sales never invested honest labor or other lawfully derived property to obtain the subsequently forfeited proceeds. Consequently, he has no reasonable expectation that the law will protect, condone, or even allow, continued possession of such proceeds because they have their very genesis in illegal activity.

Tilley, 18 F.3d at 300. *See also SEC v. Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994) (ordering a previously convicted defendant to disgorge profits of illegal securities activities not punishment for double jeopardy purposes). *But see United States v. 9844 South Titan Ct., Unit 9, Littleton, Colo.*, Nos. 94-1285, 94-1290, 1996 U.S. App. LEXIS 1559 (10th Cir. Feb. 5, 1996) (agreeing with the Ninth Circuit's holding that forfeiture of proceeds is punishment for double jeopardy purposes).

2. The forfeiture of property which facilitates criminal activity is also remedial.

Forfeiture of criminal instrumentalities protects the public from continued crime by diminishing its profits and providing obstacles to its pursuit. For example, when a drug dealer's car is forfeited, he has to find other transportation. Walking or using public transit makes transporting drugs less flexible, more time-consuming and less secure. Without the property necessary to conduct his business, including buildings and conveyances, the manufacturer or distributor of illegal drugs will have difficulty remaining in business and society will be spared the harm inflicted by this crime. The remedial purpose is not to compensate the government for its litigation costs as was the case for the fine in *Halper*; rather, forfeiture of instrumentalities serves the remedial purpose of removing the tools of the drug dealer's trade. *United States v. Cullen*, 979 F.2d 992, 994 (4th Cir. 1992); *State v. Rosenfeld*, 540 N.W.2d 915, 921 (Minn. Ct. App. 1995); *See also One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 237 (1972) (non-contraband property forfeitable as instruments of a customs offense, and analyzed as liquidated damages).

This is true irrespective of the value of the forfeited facilitating property. Considering that value as an indication of disproportionality and punishment, as was suggested in *Austin*, is illogical in the double jeopardy assessment. To do so would reward those drug merchants who are successful, and have thus created enormous harm to society, by barring under double jeopardy doctrine a criminal prosecution. On the other hand, small-time or unsuccessful drug dealers who have not managed to amass wealth would be subject to both

forfeiture and prosecution. That distinction makes no sense. *See Cullen*, 979 F.2d at 995 ("So far as the public welfare is concerned, the Ferrarri is at least as harmful an instrumentality as the Chevette"). Rather, it is the nexus between the property and the crime which is the appropriate consideration. *Austin*, 113 S. Ct. at 2815 (Scalia, J., concurring in part, concurring in the judgment). If property is sufficiently involved in crime, its removal from that use is remedial.

D. This Court Should Reconsider *Halper*'s Double Jeopardy Application To Civil Sanctions.

As discussed, the two cases on review can be reversed in accord with the actual holdings of *Halper* and *Kurth Ranch*. However, if this Court concludes that the Ninth and Sixth Circuits correctly interpreted the *Halper* doctrine, the amici states believe that that doctrine should be reconsidered and overruled. Such an expanded view of double jeopardy does not comport with the constitutional purposes of the provision. And that expanded analysis, if adopted by this Court, would continue to engender overwhelming litigation in state courts and crippling obstacles to state administration of civil and criminal justice.

The core concern of the Double Jeopardy Clause is the finality of criminal judgments and the prevention of abusive repeated prosecutions for the same offense. *Crist v. Bretz*, 437 U.S. 28, 33, 35 (1978); *Mitchell*, 303 U.S. at

399; *Breed*, 421 U.S. at 528.[24] The multiple punishment prong, at least in the context of a single trial, does no more than ensure that any punishment imposed does not exceed that authorized by the legislature. *Missouri v. Hunter*, 459 U.S. 359, 368-369 (1983). Those concerns are not furthered by the expanded *Halper* analysis employed by the Ninth and Sixth Circuits. By rejecting the legislatively authorized cumulative civil and criminal penalties for certain misconduct, that doctrine actually conflicts with that strain of prior double jeopardy jurisprudence. In fact, it creates an unwarranted shift in the balance of power between the legislative and judicial branches by substituting the trial court's judgment for the legislature's as to the appropriate sanction for misconduct.

Although addressing only the multiple punishment prong, *Halper*, when read as the Sixth and Ninth Circuits did, in fact creates a concept of "successive punishments" applied to civil actions. That concept does not address potential abuse of the criminal process through successive

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[24] Prior to *Halper*, it had been well settled that a legislature "may impose both a criminal and a civil sanction in respect to the same act or omission" without violating the Double Jeopardy Clause. *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938). Before *Halper*, therefore, the Court had considered a civil sanction in the context of determining if a statutory scheme was in fact a criminal proceeding requiring all of the constitutional protections accorded criminal defendants, despite a legislative label indicating it was intended to be a civil proceeding. The determination was done through statutory construction, and deference was paid to the legislature's denomination. Only the clearest proof that the purpose and effect of the sanction were punitive would suffice to override the legislature's manifest preference for a civil penalty. *United States v. Ward*, 448 U.S. 242, 249 (1980).

trials. The *Halper* decision does not bar a civil action following a criminal prosecution; it merely bars any portion of a civil penalty imposed that is deemed greater than that which would be remedial. Thus, the Court did not preclude a second trial, nor did it require the civil action to provide the constitutional safeguards of the Sixth Amendment and other provisions relating to criminal defendants. It is evident therefore that the Court was not furthering the successive prosecution concern of the Double Jeopardy Clause.[25]

The amici states therefore urge this Court to end the confusion in Double Jeopardy jurisprudence created by lower courts' attempts to deal with the aftermath of *Halper* and *Kurth Ranch*. The principles enunciated in prior cases for determining if a statutory scheme is in fact punitive provides for the rare case where a legislature has created what is really a criminal process but has denominated it civil. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *United States v. Ward*, 448 U.S. 242 (1980). Returning to those

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[25] It is worth noting that the remedy proposed by the Ninth Circuit for the federal system, *i.e.* using criminal forfeiture and combining it with the criminal prosecution in one action, will not necessarily work in the states. Many states do not have a criminal forfeiture procedure and cannot combine the civil forfeiture action with the criminal prosecution. Instead, those states will have to forego either the forfeiture action or the criminal prosecution if the analysis in the federal cases below is affirmed. Moreover in many states the civil forfeiture statutes require short time periods for adjudication after seizure. *E.g.*, Conn. Gen. Stat. § 54-36h(b) (1994) (forfeiture petition must be filed within 90 days of seizure and a hearing must be held promptly). Thus, it could often be the criminal prosecution which will be barred under the Sixth Circuit approach. That approach also provides an incentive for large scale criminal defendants to concede forfeiture cases quickly in order to avoid lengthy prison terms. *See People v. Hellis*, 536 N.W.2d 587, 592 (Mich. Ct. App.), *appeal denied*, 539 N.W.2d 504 (Mich. 1995).

principles will stem the tide of onerous, but meritless, double jeopardy litigation that *Halper* has unnecessarily created.

CONCLUSION

For the reasons set forth herein, the decisions of the Courts of Appeal for the Ninth and Sixth Circuits should be reversed.

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FEB 23 1996

(7) (8)

No. 95-345; 95-346

In The
Supreme Court of the United States

October Term, 1995

No. 95-345
UNITED STATES OF AMERICA, *Petitioner,*
vs.
GUY JEROME URSERY, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 95-346
UNITED STATES OF AMERICA, *Petitioner,*
vs.
$405,089.23, ET AL., *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION TO FILE BRIEF AND BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF THE PETITIONER.

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MOTION OF AMICI CURIAE TO FILE BRIEF AND BRIEF.

This motion and brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by Counsel for the Petitioner. Consent to file has not been

received from Counsel for the Respondents. The letter of Petitioner has been filed with the Clerk of this Court, as required by the Rules.

Come now Americans for Effective Law Enforcement, Inc., the International Association of Chiefs of Police, Inc., and the National Sheriffs' Association, and move this Court for leave to file the attached brief as *amici curiae,* and declare as follows:

1. *Identity and Interest of Amici Curiae*. The *amici curiae* are described as follows:

Americans for Effective Law Enforcement, Inc. (AELE), is a national not-for-profit educational organization that conducts legal research and provides law bulletins and continuing legal education programs for law enforcement administrators and their counsel.

AELE has appeared before this Court as *amicus curiae* more than one hundred times and many times in other federal and state appellate courts. Its *amicus* program seeks to establish a body of law that enhances the effectiveness of law enforcement agencies, in a constitutional manner. AELE typically appears in support of a government agency or official. However, when the facts so warrant, AELE will decline to appear in a case or will support the opposition (as it did in *Hudson v. McMillian,* 112 S. Ct. 995 (1992)).

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 82 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens. The IACP has a Narcotics and Dangerous Drugs Committee, comprised of 30 association members who represent federal,

state, and local law enforcement agencies concerned with drug interdiction activities. The responsibility of this committee is to ensure cooperation between agencies at these various levels, as well as internationally.

The IACP, through its membership and staff, has assisted the Department of Justice (DOJ) over the last two years with the development of a teaching curriculum to instruct state and local law enforcement officers in the permissible and proper use of the federal asset forfeiture statutes as a tool in combating illegal drug activities. The IACP is also a member of the Working Group on Asset Forfeiture, established by the Deputy Attorney General of the United States. The Working Group has been investigating proposed reforms to the federal asset forfeiture legislation and the DOJ's Administrative Guidelines.

The Association has consistently advocated that asset forfeiture is the single most effective tool available to law enforcement in the national effort to disrupt and then stop illegal drug activities. Since 1987, the IACP has endorsed asset forfeiture programs at the state and federal level, and has called upon the various governmental units to enact such legislation to combat illicit drug trafficking.

The IACP believes that criminal enterprises, as a matter of law, have no legal claim to the proceeds of their illegal activities, and to redirect those captured proceeds or instrumentalities is, therefore, not an additional punishment or deprivation of legally owned property, and wishes to explain the basis for its beliefs with the accompanying *amici curiae* brief.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the nation's sheriffs and jail administrators. Along with its interest in the effective admin-

istration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

2. *Desirability of an Amici Curiae Brief.* *Amici* are professional associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of administering procedures involving forfeiture actions; and (2) police legal advisors who are called upon to advise law enforcement officers and administrators in connection with such matters.

Because of the relationship with our members, and the composition of our membership and directors—including active law enforcement administrators and counsel at the state and national level—we are particularly aware of the impact of the ruling of the courts below. We respectfully ask this Court to consider this information in reaching its decision in these consolidated cases.

3. *Reasons for Believing that Existing Briefs May Not Present All Issues.* AELE, IACP, and NSA are state and national associations, and our perspective is broad. This brief concentrates on policy issues, including the importance of asset forfeiture proceedings in effectively dealing with the problem of illicit drugs in our various jurisdictions. Although petitioner is clearly represented by capable and diligent counsel, no single party can completely develop all relevant views of such issues as these.

4. *Avoidance of Duplication.* Counsel for *amici curiae* has reviewed the facts of this case and has conferred with counsel for petitioner in an effort to avoid unnecessary duplication. It is believed that this brief presents vital policy issues that are not otherwise raised.

5. *Consent of Parties or Requests Therefor.* Counsel has requested consent of the parties. The consent of Petitioner has been received and filed with the Clerk of this Court. This motion is necessary because the Respondents have not granted consent to *amici*.

For these reasons, the *amici curiae* request that they be granted leave to file the attached *amici curiae* brief.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*

See Section on Identity and Interest of *Amici Curiae, supra.*

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE DOES NOT PROHIBIT A CRIMINAL PROSECUTION BECAUSE THE GOVERNMENT HAS OBTAINED A CONSENT JUDGMENT IN A RELATED CIVIL ACTION. THE DOUBLE JEOPARDY CLAUSE DOES NOT PROHIBIT A CIVIL FORFEITURE PROCEEDING IN A CASE IN WHICH THE PROPERTY OWNERS ALSO ARE PROSECUTED FOR NARCOTICS AND MONEY LAUNDERING OFFENSES.

The courts below, *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995) and *United States v. $405,089.23, Et Al*, 33 F.3d 1210 (9th Cir. 1995), ruled that the Fifth Amendment Double Jeopardy Clause bars prosecutions of drug defendants whose property was subjected to civil forfeiture actions. In effect, these courts have held that civil forfeiture of property used to facilitate criminal activities, or that constitute the proceeds of criminal activity, necessarily constitutes "punishment" under the Double Jeopardy Clause. In so holding the courts departed from this Court's preference expressed in *United States v. Halper*, 490 U.S. 435 (1989), for a case-by-case approach to the issue of whether a particular civil sanction inflicts punishment.

These decisions will have enormous practical consequences for law enforcement in America. A categorical conclusion that all civil forfeitures constitute punishment will have the effect of completely barring a later criminal prosecution of the owner, even if the particular prior civil forfeiture were fairly characterized as substantially remedial within the purview of *Austin v. United States*, 113 S. Ct. 2801 (1993). It will dramatically alter the common practice of pursuing both forfeiture of offending

property as a civil remedy and punishment of its owner as a criminal remedy. In effect, it will end forfeiture of drug proceeds in America as it presently exists and adversely impact the efforts of prosecutors to file criminal charges. *Amici* submit that a proper application of double jeopardy principles does not support such a rule.

Prosecutors and law enforcement administrators will justifiably be reluctant to commence, prosecute, or settle civil forfeiture actions if by so doing it necessarily precludes the prosecution of serious criminal offenses. The decisions below will also engender literally thousands of motions to dismiss indictments, post-trial motions for relief, and collateral attacks on existing judgments, and will add substantial delay to the adjudication of defendants' guilt and require burdensome post-trial litigation over what should be final criminal convictions.

Amici know from our experience as professional organizations representing law enforcement authorities at all levels below the federal government, that such a result will not only impair our effort to stem the tide of the drug epidemic in America, but that it will also have a devastating financial impact on law enforcement at *all* levels of government.

The Office of the United States Attorney General has reported that revenue produced from forfeitures is "an invaluable source of funding" that is reinvested into federal, state, local and international law enforcement efforts to fight the war against crime. "In an austere budget environment," the Office notes, "the [federal] Assets Forfeiture Fund has provided law enforcement with critical resources to fight the war against crime." *Annual Report of the Dept. of Justice Asset Forfeiture Program*, F.Y. 1993 at 17-18.

Since 1985, more than $3.8 billion in illicit cash and proceeds from the sale of property have been deposited into the Fund. Almost $1.4 billion has been shared with state and local

law enforcement efforts. The Justice Department also shares drug seizure funds with foreign countries that assist United States law enforcement activities. *Annual Report of the Dept. of Justice Asset Forfeiture Program,* F.Y. 1994 at 18-20. This sharing arrangement is vital to securing much-needed cooperation of foreign governments.

More importantly, unless the assets of a drug trafficking operation are seized, those persons who are convicted will be replaced continually, as needed. As noted in one case, "...forfeitures are not punishment for criminal activity, but rather an exercise of the police power of a state to confiscate property that was instrumental in a crime so as to prevent the continuance of unlawful acts." *United States v. Jenison,* 484 F.Supp. 747, 753 (D.R.I. 1980).

Amici strongly believe that the presently utilized forfeiture procedures and programs fully protect the legitimate property interests of innocent parties; nor would we support a program that failed to do so. Moreover, present state and federal procedures and programs do not involve an abuse of power. To the contrary, they scrupulously safeguard the legitimate interests of the innocent. We respectfully urge, therefore, that this Court maintain the settled constitutional principles upon this subject. It should not foreclose what undoubtedly constitutes the most effective effort yet devised to diminish the epidemic of illicit dangerous drugs in our communities.

CONCLUSION

Amici urge this Court to affirm the decision of the courts below on the basis of the precedents of this Court and sound judicial policy.

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Nos. 95-346 and 95-345

Supreme Court, U.S.
FILED
FEB 29 1996
CLERK

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UNITED STATES OF AMERICA,

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FOUR HUNDRED FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth And Ninth Circuits

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INTEREST OF AMICI CURIAE

Virtually every state has authorized civil forfeitures and penalties to help combat the growing problem of crimes motivated by greed. These civil remedies are intended to remove the incentive for drug dealers, money launderers, perpetrators of securities fraud, and other organized criminals to engage in their illicit trades. Unlike the street corner crack dealer, major drug dealers are motivated by greed, not by their own addictions. They live, usually very well, off the weaknesses, the ignorance, the youth, the misfortunes of others.[1]

Before legislatures authorized civil forfeitures, these criminals would "do their time," then retire on their spoils, or use them to finance their re-entry into their illegal businesses. Forfeitures were intended to remove the economic power base of these criminals, and to hit them where it would hurt most: in their pocketbooks.[2]

Washington, like many states, applies federal double jeopardy interpretation to its state constitution's double jeopardy provision. *State v. Gocken*, 127 Wash. 2d 95, 107, ___ P.2d ___ (1995) (holding that Washington's double

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[1] One of the cases below, *United States v. $405,089.23 in United States Currency*, No. 95-346, 33 F.3d 1210, 1214 (9th Cir. 1994), amended on denial of rehearing, 56 F.3d 41 (9th Cir. 1995) shows just how well these dealers live. There, the government sought to forfeit, as proceeds of drug trafficking and money laundering, over $500,000, 138 silver bars, a helicopter, two boats, a plane and eleven cars.

[2] *See e.g.*, Omnibus Drug Act, Ch. 271 § 211, 1989 Wash. Laws 905.

jeopardy clause is "given the same interpretation the Supreme Court gives to the Fifth Amendment.")

This Court's opinions relating to double jeopardy in *United States v. Halper*, 490 U.S. 435 (1989), *Austin v. United States*, 113 S.Ct. 2801 (1993), and *Department of Revenue of Montana v. Kurth Ranch*, 114 S.Ct. 1937 (1994), have confused the lower courts about double jeopardy in the context of parallel civil and criminal actions. The result is chaos.[3]

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[3] For example, some courts apply *Halper*'s rational relation test and find that double jeopardy does not bar a second punishment. *See e.g., SEC v. O'Hagan*, ___ F. Supp. ___, 1995 WL 605986 (D. Minn. Aug. 8, 1995) (*Halper*, not *Austin*, determines whether forfeiture is remedial or punitive); *Ragin v. United States*, 893 F. Supp. 570 (W.D.N.C. 1995) (forfeiture of drug proceeds is not punishment because it is remedial under *Halper* and because defendant was never legally entitled to the property); *United States v. Ogbuehi*, 897 F. Supp. 887 (E.D. Pa. 1995) (forfeiture of $96,000 worth of property was rationally related, under *Halper*, to costs to government and society resulting from defendant's heroin distribution); *United States v. Box*, ___ F. Supp. ___, 1995 WL 617477 (N. D. Ill Oct. 10, 1995) (applying *Halper* rational relation test). Some, like the courts below, say or imply that *Austin* effectively overruled *Halper*, and find that double jeopardy bars a second sanction, regardless of its remedial nature. *See also United States v. 9844 South Titan Court, Unit 9, Littleton, Colorado, et al.*, 1996 WL 49002 (10th Cir. Feb. 5, 1996)

Some courts have concluded that crimes and related civil forfeitures are almost always the same offense. *See, 9844 South Titan Court, supra. United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995), *United States v. Perez*, 70 F.3d 345 (5th Cir. 1995), *Oakes v. United States*, 872 F. Supp. 817 (E.D. Wash. 1994). Others say that they are never the same offense. *See, United States v. Falkowski*, ___ F. Supp. ___, 1995 WL 568524 (D. Alaska Sept. 25, 1995).

Washington courts rely on this Court for federal constitutional interpretation, and understandably are reluctant to decide double jeopardy issues in forfeiture cases before this Court has ruled on them. Although the Washington Supreme Court recently held that forfeiture of proceeds of drug sales is not punishment, the divided court deferred consideration of whether or not forfeiture of property used to facilitate a crime is or can be the same offense as the crime. *State v. Cole*, 128 Wash. 2d 262, ___ P.2d ___ (1995), motion for reconsideration pending.

Unlike the federal government, many states, including Washington, have no criminal forfeiture provisions. Forfeitures are civil administrative or judicial proceedings conducted parallel to a criminal prosecution. Therefore this Court's decisions in the cases at bar will fundamentally affect how the states use civil forfeiture laws, and what kinds of laws legislatures will enact in the future.

Prosecutors and law enforcement agencies thus have a strong interest in how this Court decides whether and how double jeopardy applies to parallel civil and criminal proceedings. They want to be able to use the tools provided by their legislatures to remove the incentives for organized or extremely profitable criminal activity, and they want to do so in a way that does not infringe on fundamental rights.

SUMMARY OF ARGUMENT[4]

In 1965 the "fictions and rationalizations" that complicated double jeopardy law were described as the "characteristic signs of doctrinal senility." Note, *Twice In Jeopardy*, 75 Yale L.J. 262, 264 (1965). Because of the confusion caused by *Halper*, *Austin*, and *Kurth Ranch*, the "fictions and rationalizations" have multiplied exponentially, and "doctrinal senility" is no longer just an amusing description of disarray. It has arrived, like senility, erasing the memory of what double jeopardy was meant to be.

The Double Jeopardy Clause of the Fifth Amendment provides, "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." The lower federal courts and the state courts are deeply divided on what constitutes the same offense, what constitutes jeopardy, and other aspects of current double jeopardy analysis that arose only after *Halper*, *Austin*, and *Kurth Ranch*.[5]

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[4] Portions of this brief were adapted from Barbara A. Mack, *Double Jeopardy: Civil Forfeiture and Criminal Punishment – Who Determines What Punishments Fit The Crime?*, 19 Seattle U. L. Rev. (forthcoming April, 1996).

[5] For example, one of the questions before this court is whether the parallel civil and criminal proceedings in the courts below constituted, in each case, a single proceeding for purposes of double jeopardy analysis. Before *Halper* this question would not have arisen.

Halper quoted *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983) to say that cumulative punishment authorized by Congress is permissible in a single trial. But *Hunter* was a single trial case, and two proceedings were not an issue. *Halper's* use of the

Justice Frankfurter anticipated this predicament in his thoughtful concurring opinion in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). He recognized that a court's judgment whether civil penalties and forfeitures are punitive or remedial would be speculative. *Id.* at 554. He said that double jeopardy does not prevent Congress from authorizing comprehensive penalties, prescribed in advance, to be enforced in separate proceedings, and that such actions were common at the time the Fifth Amendment was ratified. *Id.* at 555-56.

If double jeopardy was not meant to bar multiple punishments that were authorized by Congress, how can citizens be protected from oppression by multiple or excessive punishments? Justice Frankfurter relied on the Eighth Amendment. *Id.* at 556.

As Justice Frankfurter observed, a careful examination of the historical background and legal development of double jeopardy leads to the conclusion that double jeopardy was never meant to restrict the authority of Congress or legislatures to determine what punishments to impose for particular conduct. This Court's jurisprudence, from *Ex Parte Lange*, 85 U.S. (Wall) 163 in 1874 until *Halper* in 1989, consistently gave great deference to legislative intent in the realm of punishments.

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quotation expanded its meaning, and after *Halper*, lower courts have gone much further. *See e.g., United States v. Millan*, 2 F.3d 17 (2d Cir. 1993). Yet there is no analysis or holding by this Court that supports the concept that cumulative punishments are permissible *only* in a single proceeding. *Halper's* use of this phrase has also led courts to confuse the multiple prosecution and multiple punishment prongs of double jeopardy analysis. *See e.g., 9844 South Titan Court, supra.*

This Court should adopt Justice Frankfurter's reasoning. The Double Jeopardy Clause is too blunt an instrument to deal with these cases, and the multiple punishments prong of double jeopardy law is not grounded in the history of the Fifth Amendment or in the cases it supposedly arises from. Instead the Court should employ the more direct and precise Eighth Amendment to curb government overreaching. This will protect criminal defendants and civil claimants without trammeling the well-recognized right of the legislature to determine what, and how many punishments fit a particular crime.

ARGUMENT

I. DOUBLE JEOPARDY WAS NEVER MEANT TO LIMIT THE AUTHORITY OF THE LEGISLATURE TO DETERMINE PUNISHMENT, INCLUDING MULTIPLE PUNISHMENTS.

A. Nothing In English Common Law, Colonial History, Or Development Of The Fifth Amendment Indicates That Double Jeopardy Was Intended To Limit The Authority Of Legislatures To Determine Punishment.

The statutory roots of double jeopardy are unclear. Neither the Magna Carta nor the English Bill of Rights of 1689 mentions double jeopardy protection, although both contain many other antecedents of our Constitution.[6]

[6] These antecedents include: the right to petition, free election of members of parliament, the consent of parliament to raise or keep an army in time of peace, free speech within parliament, parliamentary consent to levy taxes, and that "excessive bail ought not to be required, nor cruel and unusual punishments imposed." Robert S. Peck, *The Bill of Rights and the Politics of Interpretation*, 116 (1992), quoting 1 *The Bill of Rights* 4 (B. Schwartz ed. 1971) and App. B English Bill of Rights (1989).

In the seventeenth and eighteenth centuries Lords Coke and Blackstone clarified double jeopardy in their works describing the common law of England. The common law included the pleas in bar of *autrefois convict* and *autrefois acquit*, which barred a second trial after a verdict. *See* 75 Yale L.J. at 262, n.1. The word "jeopardy," which first appeared in Blackstone, only applied to prior verdicts of guilt or acquittal. Jay A. Sigler, *Double Jeopardy; The Development of A Legal And Social Policy* 20 (1969). Most criminal penalties then were capital, hence the term "jeopardy of life."[7] By the eighteenth century double jeopardy applied primarily to capital crimes. *Sigler, supra* at 4-5.

The colony of Massachusetts first codified double jeopardy, applying it not only to all kinds of criminal cases, but to civil cases as well. *Sigler, supra* at 21. Other colonies adopted Massachusetts' version of the doctrine, but broad double jeopardy protection was short-lived. *Id.* at 22. After the American Revolution, most states did not incorporate double jeopardy into their constitutions. *Id.* at 23. New Hampshire was the first state to adopt a Bill of Rights that included double jeopardy: "No subject shall be liable to be tried, after an acquittal, for the same crime or offence." *Id.* (quoting N.H. Const. of 1784, art. I, § XVI,

[7] "Life or limb" may derive from an earlier period when punishments of maiming and mutilation were common, before double jeopardy became largely limited to capital crimes. *Sigler, supra*, at 5.

reprinted in Perry and Cooper, *Sources of Our Liberties*, 384 (1959)). New Hampshire's protection, limited to former acquittals, was considerably narrower than that afforded by colonial Massachusetts.

The framers of the Constitution enacted the Bill of Rights in a mere three months, and there was little reported debate about the double jeopardy clause. *See* 1 *Annals of Congress* (Joseph Gales, ed., 1834), and *Documentary History of the First Federal Congress 1789-1791*, Vol. 1, Linda Grant Depauw, ed., 1972, Vol. 4, Charlene Bangs Bickford and Helen E. Veit, eds., 1986.

James Madison's original proposed double jeopardy language said "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." 1 *Annals of Congress* at 434, 753. The Senate changed Madison's language to "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." 4 *Documentary History of the First Federal Congress, supra* at 46.

The early development of the concept of double jeopardy and its codification in the Fifth Amendment do not tell us precisely what evil it was meant to protect against: whether it was meant to limit the discretion of prosecutors, of judges, of the legislature, or of all of them. In early England, when the common law was developing everyone represented the crown, so English common law does not help us discern the intent of the framers of our Constitution. We must look to our own case law for answers.

B. *Ex Parte Lange*, Cited As The Genesis Of The Multiple Punishments Prong Of Double Jeopardy Analysis, Holds Only That A Judge May Not Impose A Sentence Beyond That Authorized By The Legislature.

Ex Parte Lange, 85 U.S. (Wall) 163 (1874) is universally cited as the case that first defined the multiple punishments prong of double jeopardy analysis. But *Lange* does not stand for that proposition. In *Lange* the defendant was convicted of stealing U.S. mail bags. The law authorized a fine or imprisonment, but not both. Nevertheless the judge imposed a prison sentence and a two hundred dollar fine. Lange went to jail and paid the fine. Shortly thereafter the court vacated the sentence and imposed a new sentence, this time for prison alone.

The Supreme Court held that vacating the judgment and imposing a different sentence constituted two punishments for the same offense, because once the defendant "had fully suffered one of the alternative punishments to which the law alone subjected him, the power of the court to punish further was gone." *Id.* at 176.

Implicit in *Lange* is the only unifying thread in double jeopardy analysis from 1874 until today: the double jeopardy clause does not restrict the legislature's ability to decide how many and what punishments fit the crime. The *Lange* opinion stands only for the proposition that the trial court may not exceed the punishment authorized by the legislature. The trial court's sentence was illegal. Had Congress authorized both a fine and prison, there would have been no issue for the Court to decide. Deference to

legislative intent became a fundamental part of twentieth century double jeopardy analysis. *See, Albernaz v. United States*, 450 U.S. 33 (1981); *United States v. Whalen*, 445 U.S. 684 (1981); *Missouri v. Hunter*, 459 U.S. 359 (1983).

Unfortunately *Lange* contains an oft-quoted dictum that is cited as the basis for the double punishment prong of double jeopardy analysis: "If there is anything settled in the jurisprudence of England and America it is that no man can be twice lawfully punished for the same offense." *Lange, supra* at 168. To support this broad statement the Court cited only cases that related to second prosecutions after a conviction or acquittal: multiple prosecution, not multiple punishment cases. *See, e.g., Cooper v. State*, 13 N.J. (1 Green) 361 (1833), *Com. v. Olds*, 15 Ky. (5 Litt.) 137 (1824), *Crenshaw v. Tenn.*, 8 Tenn. (1 Mart. & Yer.) 122 (1827), cited in *Lange* at 170-172. In fact it was not the Fifth Amendment, but the common law that served as a basis for the *Lange* Court's interpretation of the Double Jeopardy Clause: "It is very clearly the spirit of the instrument to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection." *Lange* at 170.

Since the common law at the time the Constitution was adopted limited double jeopardy to pleas in bar of *autrefois acquit, autrefois convict, former pardon,* and *autrefois attaint,*[8] no common law double jeopardy analysis cited by the Court supported its broad dictum. The

[8] *Former pardon* and *autrefois attaint* are obsolete pleas not applicable to our criminal procedure. *See,* Note, *Twice in Jeopardy,* 75 Yale L.J. 262, n.1 (1965). *Autrefois acquit* and *autrefois convict* only apply to multiple prosecutions.

Court's decision really was based on due process, so the Court needed no common law basis for its decision. *See, Kurth Ranch, supra,* at 1956, Scalia, J. dissenting.

Lange was not a unanimous opinion. In his dissenting opinion Justice Clifford emphasized that the Double Jeopardy Clause was only meant to apply to multiple prosecutions. *Lange, supra* at 201. The disagreement in 1874 frames the question before this Court today: Was double jeopardy ever meant to protect against multiple punishments? Even the *Lange* majority believed Congress could impose multiple punishments.

Twenty-two years after *Lange*, the Court directly contradicted its dictum. In *United States v. Ball*, 163 U.S. 662, 669 (1896), a double prosecution case, the Court said of the Double Jeopardy Clause "[t]he prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial."[9]

Lange held only that a judge cannot impose more punishment than the legislature authorized. It does not stand for the proposition that Double Jeopardy bars the legislature from authorizing multiple punishments.

[9] The *Ball* case is infrequently cited, and where it is, it is cited with *Lange* in support of three-pronged double jeopardy analysis. (*See e.g., North Carolina v. Pearce*, 395 U.S. 711, 717, nn. 9, 10, 11 (1969)).

C. Between 1789 and 1989 Congress Has Authorized And The Judiciary Has Upheld Multiple Punishments And Penalties For The Same Offense When Intended By Congress.

Our early forfeiture laws, based on the common law, provided for seizure and forfeiture *in rem* of ships for customs and revenues violations, piracy, and slave trading, partly because foreign owners were frequently out of reach of our courts. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 684 (1974), and Oliver Wendell Holmes, Jr., *The Common Law* 28 (Little, Brown & Co. 1923) (1981). Many of these laws provided for parallel criminal prosecution and civil forfeitures.[10]

Between the late nineteenth century and today double jeopardy has arisen in the context of parallel civil and criminal proceedings because Congress and legislatures, as they have since the beginning of the republic, have

[10] For example, the Act of Aug. 4, 1790, Chap. 35 § 60, 1 Stat. 174 provided that if goods, entered for exportation, with intent to draw back the duties, were landed in the United States, the goods and the vessels they were in were forfeitable to the government, and all persons involved subject to criminal prosecution. The Act of May 10, 1800, Chap. 51 § 1-4, 2 Stat. 70-71. provided that any person with an interest in a ship used to transport slaves would forfeit twice the value of his interest in the ship and double the value of any slave which may at any time have been transported in the vessel; and any person serving on such a vessel could be criminally convicted. The Act of Mar. 2, 1807, Chap. 22 §§ 1-10, 2 Stat. 426-30 provided for forfeiture of any vessel fitted out for the slave trade, or used to transport slaves, and for criminal punishment of those involved in the slave trade of up to ten years in prison and a $10,000 fine.

passed additional laws designed to reimburse the government for the costs of criminal activity and to discourage particular kinds of conduct.

1. The Court Has Upheld The Legislature's Power To Authorize Multiple Punishments In Criminal Cases For The Same Offense.

In the 1980's the Court examined congressional intent and the multiple punishments prong of double jeopardy analysis in purely criminal cases. In these cases the Court held unequivocally that double jeopardy does not limit the power of Congress and legislatures to impose multiple punishments for the same criminal activity. Therefore in *Albernaz v. United States*, 450 U.S. 333 (1981), where the defendants were convicted of conspiracy to distribute and of conspiracy to import marijuana, double jeopardy did not bar consecutive sentences because

> "the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed . . . [and] Congress intended . . . to impose multiple punishments."

Id. at 344.

In *United States v. Whalen*, 445 U.S. 684 (1980), a case with four written opinions, all of the opinions agreed that the double jeopardy decision hinged on legislative intent. The majority opinion held that double jeopardy barred the imposition of consecutive sentences for rape and felony murder based on the same offense, because Congress had not intended to impose multiple punishments for

those offenses. *Id.* at 689. Justice White, concurring, said that the case could have been decided strictly based on statutory construction, not constitutional interpretation. *Id.* at 696. "Had Congress authorized cumulative punishments, . . . imposition of such sentences would not violate the Constitution." *Id.* Justice Blackmun, also concurring, said that "[t]he *only* function the Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended. It serves, in my considered view, nothing more." *Id.* at 697. Justice Blackmun went on to say that dicta in other cases indicating otherwise had led to confusion among state courts that "have attempted to decipher our pronouncements concerning the Double Jeopardy Clause's role in the area of multiple punishments" and such dicta should be squarely repudiated. *Id.* at 698.

Justice Rehnquist, dissenting in *Whalen*, also commented on the confusion in the realm of double jeopardy and said that "our opinions, . . . are replete with mea culpa's occasioned by shifts in assumptions and emphasis." *Id.* at 699. Justice Rehnquist concluded that double jeopardy was not implicated, that the decision should rest on statutory interpretation, and that the Court should have deferred to the lower court's analysis of whether consecutive sentences were intended. *Id.* at 705-714.

In *Missouri v. Hunter*, 459 U.S. 359 (1983) the Missouri Supreme Court held that consecutive sentences for armed criminal action and robbery convictions constituted multiple punishments for the same offense, and therefore

were barred by double jeopardy. Previously the Missouri Supreme Court had issued a challenge to the Supreme Court:

> Until such time as the Supreme Court of the United States declares clearly and unequivocally that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution does not apply to the legislative branch of government, we cannot do other than what we perceive to be our duty to refuse to enforce multiple punishments of the same offense arising out of a single transaction.

Id. at 365, quoting *State v. Haggard*, 619 S.W.2d 44, 51 (Mo. 1981). In *Hunter*, the Supreme Court responded "unequivocally," that "where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end. . . . " *Hunter, supra* at 368-69. The Court held, as originally implied in *Lange*, that double jeopardy "does no more" than prevent the sentencing court from imposing greater punishment than the legislature intended. *Id.* at 366. These cases can only mean that Double Jeopardy does not prevent Congress from authorizing multiple punishments, even for the same offense.

2. Until *Halper* The Court Deferred To Congressional Intent To Impose Civil Penalties In Addition To Criminal Punishment.

Prohibition and related tax laws in the 1920's and 1930's spawned a vast increase in double jeopardy cases,

magnifying the confusion surrounding double jeopardy and the punishment issue. The Court decided two cases on the same day in 1931 that reflect that confusion, and that may have later concerned the Court because of their seemingly inconsistent results. Perhaps as a result of such concern, in parallel civil and criminal cases the Court began consistently to use a statutory construction approach to double jeopardy analyzing congressional intent, and asking whether the purpose and effect of the civil sanction were remedial.

The two cases decided on the same day in 1931 were *United States v. LaFranca*, 282 U.S. 568 (1931) and *Various Items of Personal Property v. United States*, 282 U.S. 577 (1931). In *LaFranca*, an *in personam* action to recover liquor taxes and penalties, the Court concluded that "an action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding, although it take the form of a civil action; and the word 'prosecution' is not inapt to describe such an action." 282 U.S. at 575. The *LaFranca* Court relied on cases that either provided no authority for their own opinions, were cited out of context, or were irrelevant. *See e.g., United States v. Chouteau*, 102 U.S. 603 (1881).

Although the *LaFranca* Court never mentioned double jeopardy it did a double jeopardy analysis, concluding that its result was necessary to avoid "doubts" about the constitutionality of the civil penalty statute. 282 U.S. at 576.

In *Various Items* the government sued *in rem* to forfeit a distillery, warehouse, and a denaturing plant because the corporation conducted its business with intent to

defraud the government of taxes. The corporation and others had been convicted of conspiring to violate the statute based on the same transactions. 282 U.S. at 578-579. The Court found that double jeopardy did not bar the civil forfeiture because it was *in rem*, and that the forfeiture was not part of the punishment for the criminal offense. *Id.* at 581.

The difference between the Court's analyses in *LaFranca* and *Various Items* is that one was an *in rem* forfeiture and one was an *in personam* tax penalty. The Court never addressed whether either person was punished or prosecuted twice for the same offense. The Court could have followed the approach suggested in 1926 by Justice Holmes in *Murphy v. United States*, 272 U.S. 630 (1926), which analyzed whether the purpose of a penalty was punitive or remedial, and concluded that double jeopardy did not bar a remedial civil penalty after an acquittal.

The Court later returned to Justice Holmes' analysis. In *Helvering v. Mitchell*, 303 U.S. 391, 404 (1938) a taxpayer who had been acquitted of income tax evasion was assessed a fifty percent tax penalty. The Court deferred to Congress' intent to provide a "distinctly civil sanction" for the collection of the additional assessment. *Id.* at 402. In denying Mitchell's double jeopardy claim the Court said that "in the civil enforcement of a remedial sanction there can be no double jeopardy." *Id.* at 404 (footnote omitted).

The Court continued to follow and expand upon this line of reasoning. In *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), a third party "informer" initiated a

qui tam action on behalf of the government under the False Claims Act, 31 U.S.C. 231-34 (codified as amended at 31 U.S.C. 3730 (1994)), against electrical contractors who had been convicted of defrauding the government through collusive bidding on Public Works Administration projects. The False Claims Act provided for a $2000 per offense civil penalty in addition to double damages. The "informer" won a judgment of $203,000 in double damages and $112,000 as a civil penalty for fifty-six violations of the Act. Under the *qui tam* provisions half the amount recovered would be paid to the government. The Court found that the penalty was remedial because its purpose was to make the government whole. *Id.* at 551-52.

It is Justice Frankfurter's insightful concurring opinion, however, that anticipated the coming debate over double jeopardy. Justice Frankfurter would have rejected the double jeopardy plea on different grounds. *Id.* at 553. He thought that the majority's distinction between punitive and remedial sanctions contained "dialectical subtleties" that are "too subtle" when the issue is "safeguarding the humane interests" that the double jeopardy clause was designed to protect. *Id.* at 554. Justice Frankfurter noted that punitive goals could be sought in civil proceedings and remedial goals in criminal proceedings. He deemed "speculative" a court's judgment whether a forfeiture and double damages constitute an extra penalty or an indemnity for loss. *Id.* If that were the issue, he said, the respondents should be allowed to prove that the penalty and damages were punitive because they exceeded any reasonable calculation of loss to the government. *Id.* This, of course, is exactly what the

Court did some years later in *Halper*, adopting the punitive/remedial test, and remanding for the lower court to determine whether the penalty fairly compensated the government for its costs.

Justice Frankfurter said that double jeopardy does not prevent Congress from authorizing comprehensive penalties, prescribed in advance, to be enforced in separate proceedings. *Id.* at 555. Indeed, he said, such actions were common at the time the Fifth Amendment was written, and "[i]t would do violence to proper regard for the framers of the Fifth Amendment to assume that they contemporaneously enacted and continued to enact legislation that was offensive to the guarantees of the double jeopardy clause which they had proposed for ratification." *Id.* at 556. *See supra* note 10. Rather, Justice Frankfurter relied on the Eighth Amendment to protect against oppression from cumulative punishments. *Id.*

After *Hess*, and until *Halper*, the Court continued to rely on the reasoning in *Mitchell* for cases that arose in the context of parallel civil and criminal cases. *See Rex Trailer Co. v. United States*, 300 U.S. 148 (1956).

In *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972) a jewelry dealer was acquitted of smuggling emeralds and a ring into the country without declaring them. The government then sued to forfeit the jewels. The Court held that double jeopardy did not bar the forfeiture, because Congress intended to order both criminal and civil sanctions. *Id.* at 236-37. In addition, Congress' purpose in authorizing the forfeiture was remedial. *Id.* at 237.

In *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984), a gun dealer, claiming entrapment, was acquitted of dealing in firearms without a license. He raised double jeopardy as a bar to the subsequent parallel civil forfeiture. The Court analyzed Congressional intent and determined that "only the clearest proof" that the purpose and effect of the forfeiture are punitive will suffice to override Congress' manifest preference for a civil sanction." *Id.* at 365, quoting *United States v. Ward*, 448 U.S. 242, 249 (1980).

Civil penalties and forfeitures, when intended by Congress, do not fall within the ambit of the Double Jeopardy Clause. To hold otherwise is to overrule all of these cases.

II. THE EXCESSIVE FINES CLAUSE PROVIDES A PRECISE, FAIR, AND EFFECTIVE WAY TO CURB GOVERNMENT OVERREACHING IN THE REALM OF PUNISHMENT.

A. *Halper* And *Austin* Have Unleashed The Speculative, Subjective Analyses Predicted By Justice Frankfurter.

Halper and *Austin* have changed the landscape of Double Jeopardy law. Both cases involved egregious government overreaching. In *Halper* the government sought a civil penalty of $130,000 plus double damages and costs, under the False Claims Act, when the total loss to the government was $585. 490 U.S. at 437. Furthermore the government did not initiate the civil proceeding until the defendant had been sentenced to two years in prison and

fined $5000. *Id.* at 438. *Halper* was a double jeopardy case that should have been an excessive fines case.

Austin sold a small quantity of cocaine to an undercover agent and was sentenced in state court to seven years in prison. The government sought to forfeit his home and auto body shop. The dual sovereignty doctrine barred a double jeopardy claim. Instead, Austin claimed the forfeiture violated the Excessive Fines Clause.

Halper's double jeopardy holding was narrow:

> We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

490 U.S. at 448-49.

The *Halper* opinion gave assurances that the Court was not opening the door to speculation and result-oriented analyses, as Justice Frankfurter had feared. It restricted its decision to "a rule for the rare case . . . " where a "fixed penalty provision subjects a prolific but small gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." 490 U.S. at 449. The Court did not "consider [its] ruling far reaching or disruptive of the Government's need to combat fraud." 490 U.S. at 450.

But there was dicta in *Halper*, reiterated in *Austin*, that lower courts have used to open the door. The dicta in *Halper* said that:

> a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment as we have come to understand the term.

490 U.S. at 448. This dicta can only have been meant to support *Halper's* conclusion that punishment was involved and thus, the multiple punishments prong of double jeopardy analysis applied in that case. If the *Halper* Court had meant that all civil punishment is barred by double jeopardy, it would not have remanded the case for the trial court to determine what part of the penalty was remedial.

The *Halper* Court mandated a case by case, rather than a categorical approach to double jeopardy, by saying that double jeopardy protection is "intrinsically personal," and its violation can only be identified "by assessing the character of the actual sanctions imposed on the individual by the machinery of state." 490 U.S. at 447. In *Kurth Ranch* the Court reiterated and reemphasized this approach. 114 S.Ct. at 1944-46. The categorical approach used by the courts below utterly ignores this important teaching of *Halper*.

The courts below have interpreted *Austin* to require a categorical approach to double jeopardy. The sweeping result of a categorical approach is that where there are parallel civil and criminal proceedings based on the same offense, whichever judgment is entered later is barred by the former, regardless of legislative intent or the remedial nature of the sanction. This cannot be what the Fifth Amendment was meant to protect against.

Thus, in *$405,089.23, supra* the Ninth Circuit found that forfeiture of proceeds following a criminal punishment was barred by double jeopardy, regardless of whether Congress intended multiple punishments and regardless of whether the forfeiture was remedial. Similarly, the Sixth Circuit held in *Ursery, supra*, that any facilitation forfeiture is punishment, and therefore bars a later criminal conviction, regardless of the intent of Congress, and regardless of whether any of the forfeiture was remedial.

The predicament Justice Frankfurter anticipated has arrived, full force. Result-oriented courts can now base any double jeopardy decision they choose on *stare decisis*. They can find that a facilitation forfeiture is remedial and not barred, based on *Halper*, or punitive and barred under *Austin*. *See United States v. Erinkotola*, ___ F. Supp. ___, No. 1995 WL 581240 (N.D.N.Y. Oct. 2, 1995), and *Perez, supra*. They can find that forfeiture of proceeds is remedial, and therefore not barred, or punitive and barred. *See United States v. Tilley*, 18 F.3d 295 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 574 (1994), and *$405,089.23, supra*. They can find that a civil and a criminal proceeding are the "same proceeding" under *Halper*, or that they are not. *See United States v. Millan*, 2 F.3d 17 (2nd Cir. 1993), and *$405,089.23, supra*. They can find that a civil forfeiture and crime are the same offense under *United States v. Dixon*, 113 S.Ct. 2849 (1993) or that they are not. *See Ursery, supra*[11] and *Falkowski, supra*.

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[11] The courts below and others that say a civil penalty or forfeiture and a crime are always the same offense apparently find unpersuasive the opinion in *Arizona v. Cook*, 115 S.Ct. 44 (1994), where this Court granted certiorari, vacated, and

This muddle is easily avoided by adopting Justice Frankfurter's reasoning in *Hess*, and applying the Excessive Fines Clause to cases where there is a risk of excessive punishment because of civil remedies authorized by Congress. It controls the problem without overturning this Court's long history of deference to legislative intent.

B. Double Jeopardy Is Too Blunt An Instrument, Both Too Broad And Too Narrow To Apply To Civil Penalties And Forfeitures, But The Excessive Fines Clause Is Both Precise And Fair.

Under the categorical approach adopted by the courts below, when double jeopardy is found the second "punishment" is barred. This can lead to perverse and unjust results. Suppose, for example, a man and a woman live together in a house owned by the man, and together they plant, tend, and distribute from a large marijuana growing operation at his house. If the government charges both suspects criminally and seeks to forfeit the house, the man could stall the criminal case, agree to forfeit his house or settle the civil case, and have the criminal case dismissed based on prior "punishment." The woman, having no property to forfeit, could be sent to prison and fined to the maximum extent allowed by law. This would elevate property rights over liberty interests and is unfair on its face. A defendant's wealth should not be the measure of his or her constitutional protections.

---

remanded for reconsideration in light of *Dixon, supra*, an Arizona court opinion that had barred a criminal conviction after imposition of a $150,000 civil penalty for securities fraud.

Under an excessive fines analysis, the total punishment imposed would be the issue. Forfeiture of the house could be partly or completely reversed, but the man would not be treated differently from the woman based simply on his ownership of property.

The Court could accomplish the same result in this hypothetical by returning to *Halper*, and asking whether the forfeiture was remedial. But the question "Was the forfeiture remedial?" is the functional equivalent of "Was there an excessive fine?" This demonstrates that *Halper* was a double jeopardy case that could have been presented to the Court and decided more appropriately as an excessive fines case.

Double jeopardy is also too narrow. It was not available in *Austin*. Nor would it be available where a fine, forfeiture, and prison sentence are imposed in a single proceeding. The Excessive Fines Clause addresses both cases.

Austin paved the way for this approach by holding that the Excessive Fines Clause applies to civil penalties. There the Court remanded for the lower courts to develop guidelines for excessiveness. The lower courts are doing so. *See e.g., United States v. Real Property Located in El Dorado County at 6380 Little Canyon Road*, 59 F.3d 974 (9th Cir. 1995), *United States v. Milbrand*, 58 F.3d 841 (2d Cir. 1995), *United States v. Alexander*, 32 F.3d 1231 (8th Cir. 1994), *United States v. Chandler*, 36 F.3d 358 (4th Cir. 1994). Using the excessive fines clause is fair, and does not merely protect the propertied from criminal prosecution.

CONCLUSION

This Court has its first clear opportunity in decades to address all of the issues surrounding double jeopardy in the context of parallel civil and criminal cases. The Court should rely on Justice Frankfurter's well-reasoned concurring opinion in the *Hess* case, which is consistent with the Court's history of deferring to congressional authority to determine what and how many penalties to impose for particular conduct. The Excessive Fines Clause provides the fairest and most effective way to curb government overreaching that the Court was concerned about in *Halper*, *Austin*, and *Kurth Ranch*. For all of the reasons discussed above, the Court should reverse the decisions of the Ninth and Sixth Circuits.

Respectfully Submitted,

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No. 95-346 and 95-345

Supreme Court, U.S.
FILED
FEB 23 1996
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,
v.
GUY JEROME URSERY,
Respondent,
and
UNITED STATES OF AMERICA,
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v.
FOUR HUNDRED FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, et al.,
Respondent.

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BRIEF OF THE COUNTIES OF SAN BERNARDINO, ALAMEDA, SAN JOAQUIN AND KERN, CALIFORNIA, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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32 pp

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Bureau of Justice Statistics, U.S. Department of Justice, *Sourcebook of Criminal Justice Statistics — 1994*, at 2 (1995)	14
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No. 95-346 and 95-345

In the Supreme Court
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OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,
v.
GUY JEROME URSERY,
Respondent,
and
UNITED STATES OF AMERICA,
Petitioner,
v.
FOUR HUNDRED FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, et al.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth and Sixth Circuits

BRIEF OF THE COUNTIES OF SAN BERNARDINO, ALAMEDA, SAN JOAQUIN AND KERN, CALIFORNIA, AS AMICI CURIAE IN SUPPORT OF PETITIONER

The amici curiae, the District Attorney of San Bernardino County, California, and the Counties identified on the cover, through their respective District Attorneys and deputy district attorneys, respectfully submit this brief pursuant to Rule 37, Section 4, of the RULES of the SUPREME COURT of the UNITED STATES.

STATEMENT OF INTEREST

The Ninth Circuit Court of Appeals set aside the civil forfeiture of drug proceeds as a second "punishment" in violation of the Double Jeopardy Clause finding the defendants had been previously convicted of related criminal charges in a "separate proceeding." Although the court decision examines the federal statute, 21 U.S.C. Section 881(a)(6), the state of California has a comparable statute which is patterned after the federal statute, California Health and Safety Code Section 11470(f).[1] Since federal law is persuasive in California appellate courts interpreting the state asset forfeiture statute, *People v. Superior Court (Moraza)*, 210 Cal.App.3d 592; 258 Cal.Rptr.2d 499 (1989); *People v. $8,921.00 U.S. Currency*, 28 Cal.App.4th 1226, 1232, n. 6; 34 Cal.Rptr.2d 210 (1994), California prosecutors have faced numerous challenges to the state asset forfeiture law based on the Ninth Circuit ruling challenged in this appeal.

Civil in rem forfeiture is a vital part of the California law enforcement strategy to strip drug traffickers of their illicit proceeds, *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), and to effectuate the remedial purposes of California Health and Safety Code section 11469(j).

United States v. $405,089.23, 33 F.3d 1210 (9th Cir. 1994), *amended* 56 F.3d 41 (9th Cir. 1995), *cert. granted*, (U.S. Jan. 12, 1996) (No. 95-346) and the companion case of *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995), *cert. granted*, (U.S. Jan. 12, 1996) (No. 95-345) question the

[1]The version of the California Health and Safety law applicable on January 1, 1989 through December 31, 1993 is found at Stats. 1988, c. 1492, (A.B. 4162, Katz). The law was subsequently amended on August 19, 1994, effective on January 1, 1994, by Stats. 1994, c. 314 (A.B. 114, Burton).

constitutionality of separately filed civil in rem proceedings and criminal prosecutions based on the same offense if they are not litigated in the "same proceeding." California Health and Safety Code sections 11470-11495 provide for a civil in rem proceeding which is comparable to the federal civil in rem proceeding found at 21 U.S.C. Section 881. Failure to litigate these cases in a single proceeding has raised challenges to the state forfeiture statute alleging additional violations of the Double Jeopardy Clause.

Finally, the Respondents (Charles Arlt, James Wren, Payback Mines) have filed an appeal from the forfeiture judgment obtained under the California state civil in rem forfeiture law (*People v. 1986 Chevrolet Crew Cab Pickup, et al.*, No. E013870 (Cal. Ct. App., 4th App. Dist., Div. 2, briefed Aug. 17, 1995), in which they are requesting the court to reverse the judgment based on violations of the Double Jeopardy Clause as interpreted by the Court of Appeals in *$405,089.23*. A decision on that appeal is still pending and this Court's decision in the present appeal will impact that case as well as California state asset forfeiture law.

SUMMARY OF ARGUMENT

The constitutional issues to be resolved by this Court are of crucial significance to state and local law enforcement entities. The appellate decisions under review have unleashed a deluge of litigation by criminal defendants seeking to dismiss criminal convictions and sentences and claimants attempting to set aside civil forfeiture judgments. The impact has extended far beyond the realm of asset forfeiture litigation and imperils the use of any administrative hearing or civil sanction by the government.

The intent of the Court to curtail government overreaching and abuse of power has been ill-served by application of the Fifth Amendment Double Jeopardy Clause in *United*

States v. Halper 490 U.S. 435 (1989), because of the internal inconsistency of the language within the case and the formulation of an imprecise standard of review which is not appropriate for all civil sanctions. The application of *Halper* and its progeny to parallel criminal and civil cases has cast doubt upon the continued vitality of the use of any civil sanctions by governmental agencies. The prophylactic powers envisioned by the Court are properly addressed by the Eighth Amendment Excessive Fines Clause which is better suited to evaluate and balance the punitive and remedial factors encountered in individual cases.

Relying on language from *Austin v. United States*, 113 S. Ct. 2801 (1993) the Ninth and Sixth Circuits incorrectly determined that all forfeiture cases are "punitive" for constitutional analysis under the Fifth Amendment. The correct analysis demonstrates that "proceeds" forfeitures are never punishment because they simply part the illicit fruits of crime from those with no lawful interest in them and that "instrumentality" forfeitures are not punitive so the long as they serve "rough remedial justice" and compensate the government for the societal costs and damages incurred on account of the criminal activity.

Finally, in *$405,089.23* and *Ursery* the appellate courts determined that parallel criminal and civil cases violate the Fifth Amendment unless they are brought in a "single proceeding." The proper holding is that separate criminal and civil sanctions do not raise double jeopardy protections because they involve neither two criminal trials nor two criminal punishments. The conflicting rights and issues inherent in parallel criminal and civil actions cannot be addressed by a single proceeding and would raise serious constitutional questions. Additionally there is no requirement that parallel criminal and civil cases be litigated in a "single proceeding" when they are brought by separate federal and state entities under the "dual sovereign rule."

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS HAS A DETRIMENTAL IMPACT ON CALIFORNIA ASSET FORFEITURE LAW

Since September 1994, when the Ninth Circuit Court of Appeals issued its opinion in *$405,089.23*, California state prosecutors have seen a marked increase in double jeopardy litigation.

The main effort has been directed against "parallel" criminal prosecutions and civil in rem forfeiture actions. Attempting to avoid the imposition of criminal penalties, many defendants have brought motions to set aside criminal convictions and incarceration on the basis of a civil forfeiture judgment that was incurred prior to the criminal conviction. Because of *$405,089.23*, some of those efforts have been successful and, as in *Ursery*, criminal convictions have been dismissed and sentences reversed (*People v. Marshalek*, No. B099586 (Cal. Ct. App. 2nd App. Dist., Div. 6, *appeal docketed* Feb. 1, 1996); *People v. Prince*, No. A067920 (Cal. Ct. App., 1st App. Dist., Div. 1, argued Jan. 10, 1996)). Numerous petitions for habeas corpus relief have been filed at all levels of the state judiciary by incarcerated defendants attempting to set aside criminal sentences (e.g., *In re Jeffrey Allen Biddinger on Habeas Corpus,* No. S049426 (Cal., *pet. for review denied* Dec. 21, 1995)). Other parties have attacked civil forfeiture judgments based on a prior criminal conviction (e.g., *People v. 1986 Chevrolet Crew Cab Pickup, et al.,* No. E013870 (Cal. Ct. App., 4th App. Dist., Div. 2, briefed Aug. 17, 1995)).

However, the most significant impact of the *$405,089.23* decision is now being observed in areas of criminal prosecution unrelated to drug asset forfeiture. The ability of administrative agencies to hold administrative hearings and

impose administrative sanctions is severely threatened. Challenges to Department of Motor Vehicle license revocation hearings, *Baldwin v. Department of Motor Vehicles,* 35 Cal.App.4th 1630; 42 Cal.Rptr. 2d 422 (1995), *modified,* 36 Cal.App. 4th 545N and prison board disciplinary hearings involving loss of good time credits, *United States v. Brown,* 59 F.3d 102 (9th Cir. 1995), have already been filed in California. Future attacks are expected to challenge actions by state agencies revoking licenses of medical, legal and education professionals and building contractors, regulating business enterprises such as liquor stores, securities, and insurance companies, and setting industrial occupational safety standards. If any type of administrative action is imposed which could be interpreted as "punishment" under the definition articulated by the Court of Appeals in *$405,089.23,* any subsequent criminal prosecution would be barred.

The continued viability of the *$405,089.23* decision could have serious consequences for law enforcement. Currently, state legislatures have empowered prosecutors to utilize civil remedies to combat crime in areas unrelated to narcotic asset forfeiture such as consumer, insurance and welfare fraud, child support, and environmental law. This is deemed appropriate as these are areas that are not effectively controlled by traditional criminal punishment such as incarceration. The rationale of the Ninth Circuit Court of Appeals in *$405,089.23* pertaining to "punishment" and "single proceedings" could prevent prosecutors from utilizing any type of civil sanction to combat these emerging areas of economic crime.

II.

THE COURT SHOULD APPLY THE EIGHTH AMENDMENT TO SEPARATE CIVIL SANCTIONS

The focus of the majority opinions in both *United States v. Halper,* 490 U.S. 435 (1989) and *Department of Revenue of Montana v. Kurth Ranch,* 144 S. Ct. 1937 (1994) is the excessiveness of the additional punishment, not the separate civil proceedings under the federal False Claims Act or the state Dangerous Drug Tax Act. Yet it has been the application of the separate-proceeding prong of the Double Jeopardy Clause that seems to have caused most of the present muddle. Irrespective of whether or not there is a viable multiple-punishment prong within the Double Jeopardy Clause, amici counties urge the Court to abandon its application of the Double Jeopardy Clause to separate civil actions in favor of applying solely the developing criteria under the Eighth Amendment Excessive Fines Clause to such actions, whether they are forfeitures, license suspensions, civil fines or any other civil sanction.

It has been twice suggested by members of this Court that the Fifth Amendment Double Jeopardy Clause has been pressed into service unnecessarily to reach a result that could have been reached under the Eighth Amendment. Justice O'Connor stated that the decision in *Kurth Ranch* was "entirely unnecessary to preserve individual liberty, because the Excessive Fines Clause is available to protect criminals from governmental overreaching." *Kurth Ranch,* 114 S. Ct. at 1955 (O'Connor, J., dissenting). Justice Scalia noted that:

> [t]he Excessive Fines Clause — which was rescued from obscurity only after *Halper* was decided, [citations omitted] — may well support the judgment in *Halper.* Indeed it may even *explain* the judgment in *Halper,* since much of the language of that opinion

> suggests that the Court was motivated by concern for the harsh consequences of applying a per-transaction penalty to a "prolific but small-gauge offender" *Halper*, 490 U.S. at 449.

Id. at 1958, n.2 (Scalia, J., dissenting).

Since this Court's decision in *Austin v. United States*, 113 S. Ct. 2801 (1993), the Circuit Courts have been active in attempting to define the parameters of the Excessive Fines Clause. See *e.g. United States v. Certain Real Property Located at 11869 Westshore Dr.*, 70 F.3d 923 (6th Cir. 1995); *United States v. Real Property Located in El Dorado County at 6380 Little Canyon Rd.*, 59 F.3d 974 (9th Cir. 1995); *United States v. Milbrand*, 58 F.3d 841 (2d Cir. 1995); *United States v. Chandler*, 36 F.3d 358 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995); *United States v. One Parcel of Real Property, Located at 9638 Chicago Heights*, 27 F.3d 327 (8th Cir. 1994); *United States v. Meyers*, 21 F.3d 826 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 742 (1995); *United States v. RR #1, Box 224*, 14 F.3d 864 (3d Cir. 1994); *United States v. One Single Family Residence Located at 18755 N. Bay Rd.*, 13 F.3d 1493 (11th Cir. 1994). While it is still early and, certainly, this Court has yet to speak to the specifics, the contours of the Eighth Amendment test are sufficiently visible to reveal that the same results would have been achieved in *Halper* and *Kurth Ranch* through the application of the Eighth Amendment Excessive Fines Clause rather than the Fifth Amendment Double Jeopardy Clause.

With the exception of the Fourth Circuit, which adopted a pure "instrumentality" test in *Chandler*, 36 F.3d at 365, the Circuit Courts addressing the excessive fines issue have at least recognized as permissible a hybrid test which first utilizes an "instrumentality" test and then applies a "proportionality" analysis to determine the applicability of the Eighth Amendment.

The "instrumentality" test focuses on the "taint" of the property stemming from its unlawful use. As established in *Chandler*, the court balances the nexus between the offense and the property, the role and culpability of the owner, and the possibility of separating the tainted property from other property. *Chandler*, 36 F.3d at 365. "Proportionality analysis compares the value of the property to a variety of factors which may include culpability of the claimant, the gravity of the offense, the relationship of the property to the offense and the harm caused to the community." *11869 Westshore Dr.*, 70 F.3d at 927.

Applying these principles to the *Halper* and *Kurth Ranch* facts, it is clear that the same results would have been reached under the Eighth Amendment Excessive Fines Clause as was reached under the Fifth Amendment Double Jeopardy Clause. The civil fine in *Halper* and the tax lien in *Kurth Ranch* would have been satisfied out of legitimately acquired assets which had no nexus to the criminal activities of Mr. Halper or the Kurth family. Thus, even under the pure "instrumentality" test adopted by the Fourth Circuit, the civil fine and tax would not have withstood constitutional scrutiny.

The Eighth Amendment Excessive Fines Clause is better suited to evaluate claims of governmental overreaching and abuse of power because it has the flexibility to apply the appropriate test developed by the lower courts as directed in *Austin* and to either uphold the forfeiture or mitigate any excessiveness by reducing the forfeiture to an amount determined by the court to be justified under the circumstances of the individual case. *Real Property Located in El Dorado County, Id.* at 59 F.3d at 986; *United States v. Bieri*, 21 F.3d 819, 824-25 (8th Cir.) *cert. denied*, 115 S.Ct. 208 (1994); *Appeal after remand*, 68 F.3d 232 (8th Cir. 1995). By contrast, the only option under the Fifth Amendment Double Jeopardy Clause is the complete dismissal of the

action determined to be a multiple punishment or successive prosecution.

By utilizing the Eighth Amendment, any excessiveness could be curtailed without creating the legal quagmire resulting from the application of the Double Jeopardy Clause to traditional civil sanctions such as license suspensions, civil forfeitures, consumer fraud, child support, and environmental law; in short, all the areas where legislatures have authorized parallel criminal and civil sanctions.

III.

THE COURT SHOULD RECONSIDER ITS DECISION IN UNITED STATES V. HALPER

Three members of this Court have questioned the viability of the *Halper* decision in the wake of the flood of double jeopardy litigation which that decision engendered.[2] *$405,089.23* and *Ursery* represent but a modest portion of the plethora of cases which have been litigated in an attempt to resolve the government's use of criminal and civil sanctions in parallel or related proceedings. Since the Ninth and the Sixth Circuits relied in great measure upon the *Halper* decision, the resolution by this Court of the issues presented in *$405,089.23* and *Ursery* will of necessity resolve many of the Double Jeopardy issues being litigated in areas outside narcotics asset forfeiture. For this reason, as well as the reasons set forth below, amici counties urge the court to reconsider its decision in *Halper*.

Of primary concern is the internal inconsistency of the *Halper* decision. On page 448, the Court states that: "[A] civil sanction that **cannot be said solely to serve a remedial**

[2] Justices Scalia and Thomas in *Witte v. United States*, 115 S. Ct. 2199 (1995), and Justice O'Connor in *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937 (1994).

purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Halper*, 490 U.S. at 448 (emphasis added). Courts have relied upon this language to find that *Halper* prohibits the imposition of a civil sanction which serves a remedial purpose if it in any way also deters unlawful conduct. Put another way, if the sanction were 90% remedial and 10% retributive, it is punishment for double jeopardy purposes. This is the view taken in *$405,089.23*, *Ursery* and now more recently in *United States v. 9844 South Titan Court*, 1996 WL 49002 (10th Cir. Feb. 5, 1996).

Returning to *Halper*, the next sentence in the opinion states: "We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, **but only as deterrent or retribution**." *Halper*, 490 U.S. at 448-449 (emphasis added). This language conflicts with the earlier language. Under this rationale a civil sanction would have to be 100% retributive before it would run afoul of the Constitution. Courts have relied upon this language to find that *Halper* permits the government to impose civil sanctions which can be characterized as partially punitive and partially remedial. See, *e.g.*, *United States v. Brown*, 59 F.3d 102 (9th Cir. 1995); *People v. $1,930.00 U.S. Currency*, 38 Cal. App. 4th 834; 45 Cal. Rptr. 2d 322 (1995), *modified* 39 Cal. App. 4th 1210B (1995). This conflict in *Halper* has created significant problems and should be resolved.

Halper's utilization of a sliding scale to determine when a Double Jeopardy violation occurs also must be reexamined. While examining whether the civil sanction approximates the government's expenses works in the context of the fines imposed in *Halper*, such a standard is ill-suited to determin-

ing whether other civil sanctions violate double jeopardy. How, for example, could a court determine if a 30-day administrative suspension of a driver's license for driving under the influence does or does not compensate the government for costs incurred in the prosecution of driving under the influence cases? In another context, assume State *A* spends more money to fight drug trafficking than State *B*. If the government seeks to forfeit assets of equal value from drug dealers in State *A* and *B*, the forfeiture might pass constitutional muster in State *A*, but not State *B*. These are but two examples of the problems created by *Halper's* use of a sliding scale to determine if a civil sanction violates double jeopardy, all of which illustrates the need for this Court to reexamine the *Halper* decision.

IV.

CIVIL IN REM FORFEITURE IS REMEDIAL, NOT PUNITIVE, FOR ANALYSIS UNDER THE FIFTH AMENDMENT DOUBLE JEOPARDY CLAUSE

The predicate question that must be answered before the constitutional issues can even be broached, is the determination of whether the remedy chosen by the sovereign to protect the public welfare is remedial or punitive. *Halper,* 490 U.S. at 448-449; *Austin,* 113 S. Ct. at 2812. As the court stated at *Halper,* "[t]he relevant teachings of these [double jeopardy] cases is that the Government is entitled to rough remedial justice."[3] *Halper,* 490 U.S. at 446. However, *$405,089.23* does not even take this first, vital step. If it did, its holding would have been in conformance with the Fifth Circuit. *United States v. Tilley,* 18 F.3d 295 (5th Cir. 1994). *cert. denied,* 115 S. Ct. 574 (1994).

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[3]This language appears to be at odds with the courts summary dismissal of the Government's assertion in *Austin,* 113 S. Ct. at 2812.

Indeed, the court presents the prosecutor with a Hobson's choice: (1) choose the civil remedy and the criminal buys his way out of prison; or (2) choose the criminal remedy and the criminal retains his ill-gotten gains. *$405,089.23,* 33 F.3d at 1221. This choice puts the prosecutor on the horns of a dilemma, with society being the ultimate loser.

Pre-*Austin* criminal forfeiture case law held that proceeds forfeitures were not excessive as they merely removed the illegal fruits of the crime from the defendant. See, *United States v. Sarbello,* 985 F.2d 716, 723, n.12 (3rd Cir. 1993); *United States v. Feldman,* 853 F.2d 648, 663 (9th Cir. 1988), *cert. denied, Feldman v. United States,* 489 U.S. 1030 (1989). As this Court emphasized in *Caplin & Drysdale,* it is the "restitutionary ends" of proceeds forfeiture and the "strong governmental interest in obtaining full recovery of all forfeitable assets" that was determinative. *Caplin & Drysdale,* 491 U.S. at 629-631. Even in the *Austin* decision, Justice Blackmun, in discussing the extent of the excessive fines clause stated: "The Clause prohibits only the imposition of 'excessive' fines, and a **fine that serves purely remedial purposes cannot be considered 'excessive' in any event.**" *Austin,* 113 S. Ct. at 2812, n.14 (emphasis added).

The question that remains unanswered is whether the remedy sought is remedial? If so, how is that determined? For guidance, the intent of the Congress should be considered: "[p]rofit is the motivation for this criminal activity, and it is through economic power that it is sustained and grows."[4] The Comprehensive Forfeiture Act represents, above all, Congress's attempt to "strip these offenders and organizations of their economic power." *In re Forfeiture of Caplin & Drysdale,* 837 F.2d 637 648 (1988); *aff'd, Caplin & Drysdale v. United States,* 491 U.S. 617 (1989). The

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[4]S.Rep. No. 225, 98th Cong., 1st Sess. 1991, reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3374.

California legislature has made the same determination. Cal. Health & Safety Code § 11469(j) (West 1994).

Along with the legislature, California courts have long recognized that the goal of forfeiture laws was to strip economic power from drug dealers. *People v. Superior Court (Clements)*, 200 Cal. App. 3d 491, 498; 246 Cal. Rptr. 2d 122 (1988). Indeed, the California courts, when faced with this same issue, found that if there was a rational relationship between the harm occasioned by the criminal conduct and the proportionate value of the property sought to be forfeited, then the forfeiture would be serving a remedial purpose. *People v. $1,930.00 U.S. Currency*, 38 Cal. App. 4th 834; 45 Cal. Rptr. 2d 322 (1995), *modified* 39 Cal. App. 4th 1210B (1995).

The clear conclusion to be reached is that if the law accomplishes its goal of stripping the economic profits of criminal activity and recapturing the costs of the criminal harm, then the law serves a remedial purpose. The question posed in *Halper* should have been answered in this manner: even if a civil sanction cannot be said to solely serve a remedial purpose, it can still be remedial.

What are the liquidated damages, or remedial goals, owed to society for the criminal harm? In most circumstances, these "costs" are difficult, if not impossible, to calculate. They range from the pain and grief of the spouse of a slain policeman to the medical expenses paid to treat a victim of a drug overdose. Still, some costs are representative and can be used as a measurement of the "rough justice" being sought.

In 1992, the Federal Government spent $17.423 billion dollars on the criminal justice system.[5] In 1992, there were

[5] Bureau of Justice Statistics, U.S. Department of Justice, *Sourcebook of Criminal Justice Statistics — 1994*, at 2 (1995).

119,843 drug abuse related episodes in the country's emergency rooms. It is estimated that those episodes will increase to 123,317.[6] In 1993, seventy police officers lost their lives in the line of duty, three of those while enforcing the drug laws.[7] Additionally, in two of California's large urban centers over 70% of those individuals arrested for all crimes tested positive for drugs.[8]

There are other, more imprecise, costs that must be considered. These categories of the damage and costs are legion.[9] Consider just two categories for purposes of illustration so that we have a sense of their scope. The first that should be examined is the damage to the health of all these users.[10] The second is the damage and health costs of the unborn/newborn children of pregnant female users.[11]

Given the high cost of medical treatment today, and the intrinsic damage done to these individual human beings, the harm caused by the criminal conduct is disproportionate to the economic impact on society. To put it another way, rough justice would permit the forfeiting of any drug trafficking related property to recapture these costs to society. Recapturing these costs would not, therefore, be punitive.

[6] *Id.*, at 297.

[7] *Id.*, at 354.

[8] *Id.*, at 415. (Los Angeles, 77% and San Diego, 78%)

[9] Professor Frank O. Bowman, III, *Playing "21" with Narcotics Enforcement*, 52 Wash. & Lee L. Rev. 937, 966-967 (1995).

[10] *Id.*, citing, *Physiopathology of Cannabis, Opiates and Cocaine* (G.G. Nahas & C. Latour eds., 1991); Steven R. Belenko, *Crack and the Evolution of Anti-Drug Policy*, 33-41 (1993).

[11] *Id.*, citing, Robert E. Peterson, *Legalization: The Myth Exposed, in Searching for Alternatives: Drug Control Policy in the United States* 324 (Melvin B. Krauss & Edward P. Lazear eds., 1991).

These costs are the liquidated damages approved in *Halper* which can be obtained through the civil forfeiture process for the criminal conduct which has visited such harm on society. Since this is the ultimate goal of civil forfeiture, these statutes are clearly remedial, even though from the perspective of the person whose property is being forfeited, they may appear punitive. However, given the rational relationship between the criminal harm and the costs to society, the remedial aspect of the law overshadows any punitive impact, and would not invoke any constitutional protection, such as double jeopardy.

Specifically, as to the forfeiture of proceeds, since *$405,089.23* departs from an established line of federal precedent and misconstrues the definition of punishment set forth in *Austin* as applied to purely remedial statutes, amici counties urge the court to reject it and to follow the principles summarized in *United States v. Alexander:* "Forfeiture of proceeds cannot be considered punishment, and thus, subject to the excessive fines clause, as it simply parts the owner from the fruits of the criminal activity." *United States v. Alexander*, 32 F.3d 1231, 1236 (8th Cir. 1994).

V.

THE CONSTITUTION DOES NOT PROHIBIT THE IMPOSITION OF PARALLEL CIVIL SANCTIONS TO DETER CRIME

In *$405,089.23* the court opined that the government should either include the criminal forfeiture count on the criminal indictment or pursue only the civil forfeiture action. *$405,089.23*, 33 F.3d at 1216-1222. This option prevents the government from utilizing the full range of criminal and civil sanctions to deter crime and requires it to elect which sanction it will impose. This unduly limits the power of government to utilize all of its statutory powers to deter crime.

There is no constitutional prohibition against parallel criminal and civil investigations. *Securities and Exchange Commission v. Dresser Industries Inc.*, 628 F.2d 1368 (D.C. Cir. 1980), *cert. denied, Dresser Industries v. Securities and Exchange Commission*, 449 U.S. 993 (1980). Indeed, this Court has held that the state has a justifiable interest in conducting a concurrent criminal investigation along with a civil action as "[i]t would stultify enforcement of federal law to require a governmental agency such as the FDA invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial. *United States v. Kordel*, 397 U.S. 1, 11 (1970). In essence there is no constitutional, statutory or common law rule that bars the simultaneous prosecution of separate civil and criminal actions by different agencies against the same defendant involving the same transaction. The government is entitled to vindicate several interests simultaneously in different forums. *Securities & Exchange Commission v. First Financial Group of Texas*, 659 F.2d 660, 666-667 (5th Cir. 1981).

The court in *$405,089.23* failed to recognize that criminal forfeiture is only possible when authorized by statute and that not even all federal criminal statutes have criminal forfeiture provisions. The opinion is even more problematic for states like California which do not have criminal narcotic forfeiture statutes. This leaves the state in the position of making a choice between **either** the criminal punishment **or** the civil sanction. This limitation on the power of the federal or state government to utilize the full panoply of criminal and civil sanctions is in direct contradiction of the law as stated by this Court in *Kordel.*

Separate criminal and civil sanctions do not raise double jeopardy protections because they involve neither two criminal trials nor two criminal punishments, *United States v. One*

Assortment of 89 Firearms, 465 U.S. 354, 361 (1984); *One Lot of Emerald Cut Stones v. United States*, 409 U.S. 232, 235 (1972), or they are litigated in the same proceedings. *Halper*, 490 U.S. at 450; *Kurth Ranch*, 114 S. Ct. at 1945, 1948. In *$405,089.23* and *Ursery*, the appellate courts set aside a civil forfeiture and a criminal conviction because the cases were not resolved in the same proceeding.

The appellate courts in *$405,089.23* and *Ursery* failed to recognize the impracticality of litigating criminal cases and civil actions in a single proceeding. Criminal and civil cases involve completely separate parties and issues. Whereas criminal cases involve the personal culpability of individuals accused of violating the law, civil in rem forfeiture cases focus on the property, its nexus to illegal activity and the property rights of individuals asserting an interest in the property. Frequently, forfeiture actions involve the resolution of the rights of third parties including commercial entities who may have some legitimate legal interest in the property that would preclude forfeiture. The requirement of a literal single proceeding tied to the criminal case will impair and delay the ability of these third parties, who are not criminal defendants, to litigate and resolve their property interests separate from the criminal prosecution to which they have no standing or interest.

These appellate decisions also fail to acknowledge the different governmental interests being pursued between criminal and civil actions. In a criminal action the state is asserting its power to punish an individual whereas in a civil action that state is attempting to obtain remedial relief to vindicate a state interest in the alleged forfeitable property. Requiring the criminal and civil actions to be litigated in the same proceeding would deny the state access to the equitable powers of the civil courts and the use of civil procedures to obtain swift equitable relief.

The conflicting rights and issues inherent in competing criminal and civil actions are ill served by a single proceeding. Indeed, serious constitutional questions are implicated in a single proceeding, including the Fifth Amendment's Self Incrimination Clause and the Sixth Amendment's Rights to Counsel and to Trial by Jury. Civil discovery rules are very broad and may give an unfair advantage in a criminal trial to either the defense or prosecution. *Kordel*, 397 U.S. at 11-12. How can a court separate criminal and civil discovery rules in the same proceeding? Additionally, where a defendant may have a right to appointed counsel in the criminal action, that same right does not apply to the civil action. *United States v. $100,375.00 in U.S. Currency*, 70 F.3d 438 (6th Cir. 1995); *United States v. $292,888.04 in U.S. Currency*, 54 F.3d 564 (9th Cir. 1995); *United States v. 7108 West Grand Avenue*, 15 F.3d 632 (7th Cir. 1994), *cert. denied, Flores v. United States*, 114 S. Ct. 2691 (1994). Further, a defendant may have a right to a jury trial in the criminal prosecution but not in the civil litigation. *Libretti v. United States*, 116 S. Ct. 356, 367-368 (1995).[12]

From the above discussion, and as this Court has previously acknowledged, "[t]here are often valid reasons why related crimes committed by the same defendant are not prosecuted in the same proceedings." *Witte*, 115 S. Ct. at 2208. In recognition of the unique procedural distinctions between criminal prosecutions and civil in rem cases, amici counties urge this Court to adopt the view of the government that parallel criminal and civil cases do not present the potential for abuse that the Double Jeopardy Clause was designed to prevent. *Halper*, 490 U.S. at 451, n.10.

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[12] Although California state law provides for joint trials of civil forfeitures with their underlying criminal cases (Health & Safety Code § 11488.5), the issues discussed above remain unresolved.

VI.

THE CONSTITUTION DOES NOT PROHIBIT SEPARATE PROCEEDINGS BY DUAL SOVEREIGNS

The court in *$405,089.23* criticizes the government practice of filing separate criminal and civil cases complaining that "such a manipulative prosecution strategy heightens, rather than diminishes, the concern that the government is forcing an individual to 'run the gauntlet' more than once." *$405,089.23,* 33 F.3d at 1216. Likewise, in *Ursery* the court commented on the lack of coordination of the criminal and civil cases and determined that the "civil forfeiture proceeding and criminal prosecution were two separate proceedings for purposes of double jeopardy analysis." *Ursery,* 59 F.3d at 575. Inferred from the rulings of these appellate courts is that unless all potential governmental action is imposed in one coordinated hearing the Double Jeopardy Clause is violated. What impact does such a ruling have on separate proceedings imposed by federal and state entities against the same individual?

Prior decisions of this Court have established that double jeopardy is not violated by successive prosecutions by different sovereigns based on the same conduct. *United States v. Lanza,* 260 U.S. 377, 382 (1922); *Abbate v. United States,* 359 U.S. 187 (1959). The "dual sovereign rule" has its basis in the concept of federalism that the state power to prosecute derives from separate and independent sources of power and authority that were retained by the states before admission to the Union and preserved to them by the Tenth Amendment. *Heath v. Alabama,* 474 U.S. 82, 88 (1985). This doctrine has been cited with approval by this Court in the recent opinion in *Kurth Ranch,* 114 S.Ct. at 1947, n.22. The only exception to the doctrine occurs where the State is bringing its action merely as a "tool of the federal authorities" and was a "sham or cover for the federal prosecution." *Bartkus v. Illinois,* 359 U.S. 121, 123 (1959). The dual

sovereign rule has been utilized by lower federal courts to uphold forfeiture cases where the criminal prosecution and civil forfeiture were handled by separate federal and state sovereign governments. *United States v. Certain Real Property (38 Whalers Cove Drive),* 954 F.2d 29, 38 (2d Cir. 1992), *cert. denied, Levin v. United States,* 506 U.S. 815 (1992).

In spite of this long line of court case precedent, in the aftermath of the appellate decisions of *$405,089.23* and *Ursery,* numerous challenges are being brought against separately filed criminal and civil cases that were litigated by separate sovereigns. In the federal system the Ninth and Eighth Circuits have addressed the issue, *Real Property Located in El Dorado County at 6380 Little Canyon Road,* 59 F.3d at 987; *United States v. Pena,* 67 F.3d 153, 155-156 (8th Cir. 1995) and seven district court decisions are reported out of the Ninth Circuit alone.[13] All of these cases upheld the separate criminal and civil proceedings on the authority of the dual sovereign rule.

The continued vitality of the dual sovereign rule has been questioned in a recent opinion from the Second Circuit where Justice Calabresi stated that "the exception's narrowness combine[d] with significant developments both in substantive federal criminal law and in criminal law enforcement indicate that the entire dual sovereignty doctrine is in need of serious consideration." *United States v. All Assets of G.P.S. Automotive Corp.,* 66 F.3d 483, 497 (2nd Cir.

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[13]United States v. Jackson, 904 F. Supp. 1185 (D.Or. 1995); *United States v. Wolf,* 903 F. Supp. 36 (D.Or. 1995); *United States v. Wright,* 902 F. Supp. 205 (D.Or. 1995); *United States v. Unger,* 898 F. Supp. 740 (D.Or. 1995); *United States v. Bradford,* 886 F. Supp. 744 (E.D. Wash. 1995); *United States v. De La Cruz Trujillo,* 882 F. Supp. 156 (D.Or. 1995), *aff'd, United States v. Trujillo,* 73 F.3d 371 (9th Cir. 1995); *United States v. Branum,* 872 F. Supp. 801 (D.Or. 1994).

1995).[14] Based on this comment and the vital constitutional issues presented in these cases, amici counties address the Court on the importance of maintaining the dual sovereign rule in civil forfeiture actions.

The dual sovereign rule is the core doctrine that acknowledges that States have inherent powers guaranteed to them under the Tenth Amendment to protect the peace and dignity of their sovereignty. *Abbate*, 359 U.S. at 194. For a federal prosecution to deprive the State of the ability to exercise its reserved state powers and obligation to control peace within its jurisdiction would be an affront to the principles of federalism established by the Founding Fathers of our constitutional form of government. *Bartkus*, 359 U.S. at 137-138. Further it would deny a State the power to enforce its own criminal laws because the federal sovereign "won the race at the courthouse." *Heath v. Alabama*, 474 U.S. at 93. To impose a requirement that all governmental sanctions be imposed in one unified hearing would be highly impractical as it would require federal and state authorities to attempt to keep informed of all potential related offenses. *Abbate*, 359 U.S. at 195.

The State has a constitutional right to exercise its separate power to confront crime within its jurisdiction and virtually all states have enacted state forfeiture statutes.[15] The states are not thereby dependent upon the federal authorities to exercise the forfeiture power. The purpose of

[14] A recent district court case following the reasoning of *All Assets of G.P.S. Automotive*, 66 F.3d at 497, is found at *United States v. Pena*, 1995 WL 769117 (D. Kan. Dec. 21, 1995) where the lower court ordered a *Bartkus* hearing to determine whether the federal government had an independent interest in a federal civill forfeiture following a state criminal prosecution.

[15] Lindsay D. Stellwagen, *Use of Forfeiture Sanctions in Drug Cases*, Research in Brief. Washington, D.C., National Institute of Justice (1985).

these statutes is to serve the compelling state interest of eliminating drug trafficking by stripping drug dealers (big and small) of their economic power base (the tools and profits of their trade). *Caplin & Drysdale*, 491 U.S. at 629.

States utilize the state forfeiture authority as an effective tool to deter economic crime and to complement parallel federal investigations. The case of *$405,089.23* is demonstrative of this principle. Charles Arlt and James Wren were charged by the federal government of conspiracy to manufacture methamphetamine and money laundering and were subsequently convicted. *United States v. Arlt*, 41 F.3d 516 (9th Cir. 1994).[16] The United States government filed a separate civil forfeiture on assets seized by federal and state authorities in connection with that federal criminal investigation in *$405,089.23*. State law enforcement authorities seized additional assets for forfeiture pursuant to California Health and Safety Code § 11470 and requested prosecution through the state civil forfeiture law. *People v. 1986 Chevrolet Crew Cab Pickup, et al*, No. E013870, (Cal. Ct. App., 4th App. Dist., Div. 2, briefed Aug. 17, 1995).[17]

Although, the federal sovereign filed separate criminal and civil actions, the state only filed a civil action on separate property unrelated to the federal civil forfeiture.[18] As there was no requirement of a criminal conviction for the state forfeiture action pursuant to California Health and

[16] Arlt's convictions were reversed and remanded for a new trial on December 1, 1994.

[17] According to a verified claim filed by Charles Arlt, the total value of the property seized in the state action was $374,200.

[18] Amici counties support the government's position that the federal civil forfeiture action filed against the assets of Charles Arlt, James Wren and Payback Mines, on the 'proceeds' theory of 21 U.S.C. section 881(a)(6) was remedial, not punitive, and was not a multiple punishment or successive prosecution in violation of the Fifth Amendment's Double Jeopardy Clause.

Safety Code section 11488.4(i),[19] the federal criminal conviction was not a prerequisite to the state forfeiture and a subsequent conviction or acquittal would not have barred the state forfeiture action. *One Assortment of 89 Firearms*, 465 U.S. at 367; *One Lot of Emerald Cut Stones*, 409 U.S. at 234-235. Consequently, since no state criminal charges were filed, no double jeopardy issue was raised in the state action. The state sovereign only pursued a civil remedial action which did not constitute punishment or run afoul of the Double Jeopardy Clause and was a valid use of its separate state power.

The forfeiture power exercised by federal and state authorities is not mutually exclusive and each sovereign has constitutional authority to vindicate the compelling governmental interest in recovering ill-gotten enterprise proceeds not forfeited by the other sovereign. Therefore, any requirement that two separate sanctions which constitute punishment must be litigated in the same proceeding should not be defined so narrowly as to preclude application of the dual sovereign rule.

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[19]The version of the California Health & Safety law applicable to this action is found at Stats. 1988, ch. 1492 § 9 which was the California asset forfeiture law in effect January 1, 1989 through December 31, 1993.

CONCLUSION

For all of the foregoing reasons, amici counties urge this Court to reverse the decisions of the Courts of Appeal in the instant cases.

Respectfully submitted,

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Date: February 16, 1996

(10) (11)

Supreme Court, U.S.
FILED
FEB 23 1996
CLERK

Nos. 95-345 & 95-346 (Consolidated)

IN THE

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OCTOBER TERM, 1995

UNITED STATES OF AMERICA, Petitioner,

v.

GUY JEROME URSERY, Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

UNITED STATES OF AMERICA, Petitioner,

v.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET AL., Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* COOK COUNTY STATE'S ATTORNEY'S OFFICE JOINED BY THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC. IN SUPPORT OF THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, Petitioner,

v.

GUY JEROME URSERY, Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

UNITED STATES OF AMERICA, Petitioner,

v.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, ET AL., Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* COOK COUNTY STATE'S ATTORNEY'S OFFICE JOINED BY THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC. IN SUPPORT OF THE PETITIONER

INTEREST OF *AMICI CURIAE*

The Cook County State's Attorney's Office is an entity responsible for a vast amount of criminal prosecutions and civil forfeiture actions in the State of Illinois. In 1994 alone, the Cook County State's Attorney's Office instituted approximately 28,000 felony narcotics prosecutions, as well as more than 5,600 drug-related forfeitures. The State of Illinois has enacted forfeiture statutes which are

virtually identical to the statutes at issue in the instant appeal. With this cause, this Court is asked to decide whether double jeopardy principles prohibit successive criminal prosecutions and civil forfeiture actions. In *In re P.S., a minor*, No. 78910 (Ill. January 18, 1996) (1996 Ill. LEXIS 12), the Illinois Supreme Court recently considered this question and held that double jeopardy principles are not implicated when the state prosecutes a defendant after obtaining forfeiture of the proceeds of illegal activity in a separate proceeding. Thus, the Cook County State's Attorney's Office has a compelling interest in the outcome of this appeal due to the tremendous impact it will have upon criminal prosecutions in Cook County, Illinois.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publications, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all our citizens. NDAA has a compelling interest in the outcome of this appeal due to the tremendous impact it will have upon criminal prosecutions across the country.

In accordance with Supreme Court Rule 37.2, this Brief of *Amici Curiae* is being filed with written consent of all parties to this case.

SUMMARY OF ARGUMENT

In the *Ursery* case, the United States Court of Appeals for the Sixth Circuit held that the double jeopardy provision of the Fifth Amendment prohibited prosecution of the defendant because he had already been punished in a civil forfeiture action brought under 21 U.S.C. §881(a)(7).

In the *$405,089.23* case, the United States Court of Appeals for the Ninth Circuit held that the double jeopardy provision of the Fifth Amendment barred a civil forfeiture action for the proceeds of illegal drug sales where the owners of the subject property had already been prosecuted for criminal violations arising from the same facts. The Courts of Appeals in both of these cases erred in holding that a civil forfeiture action imposes punishment for double jeopardy purposes.

A. Multiple punishments only violate the double jeopardy provision of the Fifth Amendment when they are imposed for the same offense. Because the actions in these cases are not prosecutions for the same offense, the double jeopardy bar does not apply here.

In the cases at bar, while the civil and criminal actions may have arisen out of the same conduct of the defendants, they are not necessarily prosecutions for the same offense. In *United States v. Dixon*, 509 U.S. ____, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993), this Court abandoned the "same conduct" test of *Grady v. Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), and returned to the test originally set forth in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Under the *Blockburger* "same elements" test, two offenses are not the same for double jeopardy purposes as long as each offense contains at least one element that the other does not. In each of the cases at bar, the criminal offense and the related forfeiture action each require proof of an element that the other does not. For this reason, the lower courts erred in applying double jeopardy principles.

B. In the *$405,089.23* case, the Ninth Circuit erred in holding that forfeitures of the proceeds of criminal activity constitute punishment for double jeopardy purposes. This

Court held in *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 104 S. Ct. 1099, 79 L. Ed. 2d 361 (1984), that the forfeiture of contraband is remedial, and not punitive, because it removes dangerous or illegal items from society. Because the claimants in the *$405,089.23* case had no right to acquire the proceeds of their illegal activities, they were not punished by their forfeiture. The Ninth Circuit therefore erred in applying double jeopardy principles.

C. In the *Ursery* case, the Sixth Circuit erred in holding that forfeiture of property which facilitates a criminal offense always imposes punishment. In fact, many such forfeitures are remedial, rather than punitive, because they remove the instrument through which the claimants commit their crimes, making it impossible for the claimants to commit further crimes. Additionally, these forfeitures provide the type of "reasonable liquidated damages" authorized by this Court in *United States v. Halper*, 490 U.S. 435, 446, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989), as they attempt to reimburse the government for the costs to it and society from the claimants' illegal activities.

D. Public policy concerns require reversal of the decisions of the Courts of Appeals. If jeopardy attaches in civil forfeiture proceedings, the government will be denied the opportunity to seek imprisonment of an offender, even though imprisonment was not even an available penalty in the civil forfeiture proceeding. Conversely, where the government instead pursues a criminal action, convicted drug dealers will be allowed to reap the financial rewards of their illegal activities. Finally, the decisions here will have a tremendous adverse impact in state courts where combining civil forfeitures with criminal prosecutions is not an option.

This Court should resolve the split of authority in the Courts of Appeals by clearly defining the circumstances under which a civil forfeiture action will implicate double jeopardy concerns. In making this determination, this Court should consider that in many instances a forfeiture will constitute a different offense from the related criminal prosecution, and that even a forfeiture that does not constitute a different offense may be remedial rather than punitive. Thus, many civil forfeiture actions will not violate the double jeopardy clause's prohibition of multiple punishments for the same offense.

ARGUMENT

THE COURTS OF APPEALS ERRED IN HOLDING THAT THE DOUBLE JEOPARDY CLAUSE BARS THE GOVERNMENT FROM PURSUING BOTH A CRIMINAL PROSECUTION AND A CIVIL FORFEITURE ACTION.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. That clause protects against three distinct abuses: 1) a second prosecution after acquittal for the same offense; 2) a second prosecution after conviction for the same offense; and 3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656, 664-65 (1969). It is the third of these protections—the prohibition of multiple punishments for the same offense—that is at issue here. In the present cases, the United States Courts of Appeals for the Sixth and Ninth Circuits held that a claimant in a successful forfeiture action may not also be criminally prosecuted based on the same set of facts supporting the forfeiture. The decisions of the Courts of Appeals are mani-

festly erroneous and must be reversed for several reasons. First, the Ninth Circuit blindly applied double jeopardy principles without determining whether the civil and criminal actions involved the "same offense" under the *Blockburger/Dixon* test, while the Sixth Circuit erroneously concluded that the criminal offense was a lesser included offense of the forfeiture. Second, the Ninth Circuit erred in holding that forfeitures of the proceeds of illegal activity pursuant to 21 U.S.C. §881(a)(6) constitute punishment for double jeopardy analysis. Third, the Sixth Circuit failed to acknowledge that forfeitures of property which facilitates a criminal offense pursuant to 21 U.S.C. §881(a)(7) may be remedial rather than punitive for purposes of double jeopardy analysis. Finally, the decisions of the Courts of Appeals conflict with sound public policy.

A. Double Jeopardy concerns are not triggered by a civil forfeiture action and a criminal prosecution, because they do not impose punishment for the "same offense."

In the cases at bar, the Courts of Appeals concluded that the civil forfeitures amounted to punishment, and therefore the government's actions in obtaining civil forfeitures and criminal convictions in separate proceedings violated the Double Jeopardy Clause. In so holding, the Courts of Appeals overlooked a crucial fact: double jeopardy principles do not prohibit the imposition of all multiple punishments, but only those punishments imposed *for the same offense*. U.S. Const. amend. V; *see also United States v. Halper*, 490 U.S. 435, 440, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989); *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1945, 218 L. Ed. 2d 767 (1994). The case of *United States v. Dixon*, 509 U.S. ____, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993) contains the last definitive statement from this Court concerning whether two actions involve the same

offense for double jeopardy purposes. In *Dixon*, this Court held that it is not necessary for the government to show that successive prosecutions were based on different *conduct* in order to avoid double jeopardy. In so doing, this Court overruled the "same conduct" test of *Grady v. Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), and returned to the "same elements" test of *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

Under the "same elements" test, now known as the *Blockburger/Dixon* test, two actions will constitute separate offenses for double jeopardy purposes if each requires proof of an element that the other does not. When applying the *Blockburger/Dixon* test, courts must focus upon "*the statutory elements of each offense, rather than on the actual evidence presented at trial.*" *Illinois v. Vitale*, 447 U.S. 410, 416, 100 S. Ct. 2260, 65 L. Ed. 2d 228 (1980) (emphasis added).

A criminal prosecution requires proof beyond a reasonable doubt of an element not found in a forfeiture case: that the defendant possessed the requisite mental state and performed the proscribed act. To prevail in a forfeiture action, however, the government need only show probable cause to believe that someone has used or obtained the property through prohibited actions. Once the government has met this burden, the burden then shifts to the property owner to establish lack of knowledge or consent. This is an affirmative defense and not one of the elements in the government's forfeiture case. *United States v. Thibault*, 897 F. Supp. 495, 498 (D. Colo. 1995). "Probable cause does not require a showing of any specific claimant's mens rea. It must only be shown that the property has a substantial nexus with drug related activity." *United States v. Falkowski*, 900 F. Supp. 1207, 1215 n.8

(D. Alaska 1995). Indeed, a forfeiture action may succeed even without criminal prosecution of the property owner or anyone else. *See United States v. One 1987 Jeep Wrangler Automobile*, 972 F.2d 472, 476 (2d Cir. 1992). Conversely, a forfeiture case requires proof of an element not necessary to a criminal prosecution: that the subject property was involved in a crime. Thus, because a criminal prosecution and a civil forfeiture each always require proof of an element that the other does not, under the *Blockburger/Dixon* test a civil forfeiture never has the same elements as a criminal offense.

In *In re P.S., a minor*, No. 78910 (Ill. January 18, 1996) (1996 Ill. LEXIS 12), the Illinois Supreme Court applied the *Blockburger/Dixon* test and concluded that forfeiture of the proceeds of drug sales required proof of different elements from criminal charges of possession of a controlled substance, possession with intent to deliver, and possession without a tax stamp. In reaching this conclusion, the court noted that there was no factual link between the forfeitable proceeds and the criminal offense: "[t]he cash could not have been traced to the proceeds of any sale of any of the cocaine found in the indictment since defendant is charged with possession of that cocaine, which had not yet been sold." *In re P.S., a minor*, No. 78910 (Ill. January 18, 1996) (1996 Ill. LEXIS 12, *22), citing *United States v. Leaniz*, No. CR-2-90-18 (S.D. Ohio, March 31, 1995) (1995 U.S. Dist. LEXIS 4039 *15); *see also United States v. Rhodes*, 62 F.3d 1449, 1452 (D.C. Cir. 1995).

In the *$405,089.23* case, the Ninth Circuit failed to consider whether the civil forfeitures and the criminal offenses were the same under the *Blockburger/Dixon* test. In the *Ursery* case, the Sixth Circuit applied the *Blockburger/Dixon* test, but erroneously concluded that the

criminal offense was a lesser included offense of the forfeiture. However, an examination of the elements of the offenses involved here demonstrates that they are separate offenses under the *Blockburger/Dixon* test.

In the *Ursery* case, the defendant was prosecuted for manufacturing marijuana in violation of 21 U.S.C. §841(a)(1). Under that statute, the government must prove that the defendant manufactured a controlled substance, and that he did so knowingly. The defendant's residence was forfeited pursuant to 21 U.S.C. §881(a)(7), which provides for forfeiture of real property used or intended to be used to commit or facilitate commission of a felony violation of title 21 of the United States Code. Each of these statutes contains an element that the other does not. To establish the criminal violation, the government must prove that the defendant acted knowingly or intentionally. The forfeiture action, however, requires no proof of any mental state. Likewise, to obtain forfeiture of the defendant's real estate, the government must prove that the real estate was used or intended to be used to commit or facilitate the commission of a drug offense. The criminal prosecution does not require any proof that any real estate was used in the offense.

The *$405,089.23* case involved two criminal offenses. First, the defendants were prosecuted for money laundering in violation of 18 U.S.C. §1956, which requires proof that the defendants conducted or attempted to conduct a financial transaction involving the proceeds of unlawful activity, and that they did so knowingly or with the intent to promote the unlawful activity. Some of the defendants' property was forfeited under 18 U.S.C. §981(a)(1)(A), which required the government to prove that the property was involved in a violation of §5313(a) or 5324(a) of title 31, or §1956 or 1957 of title 18, or traceable to such prop-

erty. Once again, the criminal proseecution requires proof of a mental state not necessary to the forfeiture, while the forfeiture requires proof of the involvement of property not necessary to the criminal case.

The defendants in the *$405,089.23* case were also prosecuted for conspiracy to manufacture methamphetamine, in violation of 21 U.S.C. §841(a)(1). Under that statute, the government must prove that the defendants knowingly conspired to manufacture a controlled substance. The defendants' property was forfeited pursuant to 21 U.S.C. §881(a)(6), which allows forfeiture of money furnished or intended to be furnished in exchange for a controlled substance, or proceeds traceable to such an exchange. Once again, each statute contains an element that the other does not. The criminal offense requuires proof of a conspiracy to manufacture a controlled substance, but does not require proof of any sale or intended sale. The forfeiture action, on the other hand, reqquires proof of a sale or intended sale but requires no prooof of any conspiracy to manufacture. Thus, the criminal offense and the forfeiture are not the "same offense" undder the *Blockburger/ Dixon* test.

Because the criminal prosecutions and civil forfeitures in these cases are not prosecutions for the same offense, the Courts of Appeals erroneously appplied double jeopardy principles in the cases at bar. Accorddingly, *Amici Curiae* respectfully urge this Court to reveerse the decisions of the Courts of Appeals.

B. Forfeitures of the proceeds of illegal drug sales pursuant to 21 U.S.C.§881(a)(6) are remedial and do not constitute "punishment."

In *United States v. Halper*, 490 UU.S. 435 (1989), this Court analyzed the application of a $$130,000 civil fine to

a fraud on the government resulting in $585 in damages, and determined that such an "overwhelmingly disproportionate" assessment amounted to punishment within the meaning of the double jeopardy clause. Thus, this Court held that "a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." *Halper*, 490 U.S. at 448-49. This Court noted, however, that the government may use civil sanctions to achieve "rough remedial justice," including "reasonable liquidated damages or a fixed sum plus double damages." *Halper*, 490 U.S. at 446. Accordingly, customs forfeitures following criminal convictions were held permissible as they provide "a reasonable form of liquidated damages" for the costs of investigation and enforcement of the customs laws. *Halper*, 490 U.S. at 446, citing *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 93 S. Ct. 489, 34 L. Ed. 2d 438 (1972).

Four years later, in *Austin v. United States*, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993), this Court held that civil forfeitures of property used to further drug trafficking constitute "punishment" for determining the applicability of the Eighth Amendment's excessive fines clause. In making this determination, this Court observed that "[t]he Double Jeopardy Clause has been held not to apply in civil forfeiture proceedings, but only in cases where the forfeiture could properly be characterized as remedial." *Austin*, 113 S. Ct. at 2805 n.4.

In the *$405,089.23* case, the government sought forfeiture of the proceeds of illegal narcotics sales under 21 U.S.C. §881(a)(6). The Ninth Circuit relied heavily on the *Austin* case in holding that forfeitures impose punishment, but

failed to recognize that *Austin* did not determine that *all* forfeitures constitute punishment. The *Austin* decision dealt only with forfeitures of facilitating property under 21 U.S.C. §§ 881(a)(4) and (a)(7), and not with forfeitures of the proceeds of illegal drug sales under 21 U.S.C. §881(a)(6).

A claimant has no right to acquire the proceeds of illegal drug sales, and thus has no right to keep the money he acquired. "[I]f money constitutes the proceeds of a drug transaction, it is illegal to possess and thus is rightly considered contraband." *United States v. $45,140.00*, 839 F. Supp. 556, 558 (N.D. Ill. 1993). In *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 104 S. Ct. 1099, 79 L. Ed. 2d 361 (1984), this Court held that the forfeiture of contraband is remedial, rather than punitive, because it removes dangerous or illegal items from society. In *Austin*, this Court expressly recognized and reaffirmed this holding. *Austin*, 113 S. Ct. at 2811. This Court further noted that the Double Jeopardy Clause does not apply to civil forfeiture proceedings which are remedial in nature. *Austin*, 113 S. Ct. at 2816 n.4. Thus, this Court in *Austin* clearly recognized that the reasoning underlying its application of double jeopardy principles to property forfeitures has no application to remedial forfeitures of the proceeds of illegal drug sales.

Following this reasoning, numerous courts have reached a result contrary to the decision of the Ninth Circuit in *$405,089.23*, distinguishing the property forfeitures at issue in *Austin* from forfeitures of illegal drug proceeds. These courts have expressly held that because the forfeiture of illegal drug proceeds is remedial, it is not punishment. *See United States v. Tilley*, 18 F.3d 295, 300 (5th Cir. 1994); *United States v. $184,505.01 in U.S. Currency*, No. 94-3528 (3d Cir., December 29, 1995) (1995 U.S. App. LEXIS 37151); *United States v. Fields*, No. 94-10185 (5th

Cir., January 9, 1996) (1996 U.S. App. LEXIS 265); *United States v. Salinas*, 65 F.3d 551 (6th Cir. 1995); *United States v. Clementi*, 70 F.3d 997 (8th Cir. 1995); *United States v. One Parcel of Real Estate Located at Rural Route 9, LaHarpe, Illinois*, 900 F. Supp. 1032 (C.D. Ill. 1995); *United States v. One 1989, 23 Foot, Wellcraft Motor Vessel*, Civ. No. 90-1571(PG) (D. Puerto Rico, December 13, 1995) (1995 U.S. Dist. LEXIS 19687); *Clark v. United States*, No. 4:95CV129 (E.D. Va., December 19, 1995) (1995 U.S. Dist. LEXIS 19992); *United States v. $288,930.00*, 838 F. Supp. 367, 370 (N.D. Ill. 1993); *$45,140.00*, 839 F. Supp. at 558; *United States v. Moffitt*, 875 F. Supp. 1190, 1197 (E.D. Va. 1995); *Maldonado v. United States*, No. 94 Civ. 7120 (S.D.N.Y. Jan. 6, 1995) (1995 U.S. Dist. LEXIS 108, *6); and *United States v. Haywood*, 864 F. Supp. 502, 507-09 (W.D.N.C. 1994). As the *Tilley* court explained:

> The possessor of proceeds from illegal drug sales never invested honest labor or other lawfully derived property to obtain the subsequently forfeited proceeds. Consequently, he has no reasonable expectation that the law will protect, condone, or even allow, his continued possession of such proceeds because they have their very genesis in illegal activity. . . . [T]he forfeiture of illegal proceeds, much like the confiscation of stolen money from a bank robber, merely places that party in the lawfully protected financial status quo that he enjoyed prior to launching his illegal scheme. This is not punishment "within the plain meaning of the word."

Tilley, 18 F.3d at 300 (quoting *Halper*, 490 U.S. at 449).

Because the forfeiture of illegal drug proceeds does not impose punishment, this type of action does not implicate the Double Jeopardy Clause. The Ninth Circuit in *$405,089.23* ignored the remedial nature of forfeitures of illegal drug proceeds, and erroneously extended the reason-

ing of *Austin*. Accordingly, the decision of the Court of Appeals for the Ninth Circuit must be reversed.

C. Forfeitures of property which facilitates a criminal offense pursuant to 21 U.S.C.§881(a)(7) are remedial and do not constitute "punishment."

As demonstrated in Point B herein, forfeitures of the proceeds of illegal activity are clearly remedial. But even a forfeiture of property which facilitates a crime can be remedial. For example, the forfeiture of a crack house to abate a public nuisance would certainly be remedial. Likewise, the forfeiture of property used to facilitate the distribution of illegal drugs is remedial. Property which a claimant may have lawfully acquired becomes contraband when the claimant chooses to use it to further his illegal activities. In *United States v. Cullen*, 979 F.2d 992 (1992), the Fourth Circuit upheld the forfeiture of a building which housed a clinic and pharmacy from which a physician distributed controlled substances outside the scope of legitimate medical practice. The Court determined that although "[a]ny sanction imposed by the government may have a retributive aspect," the forfeiture of the physician's building "plainly served a remedial purpose, by removing the instrument through which [the physician and his wife] had plied their unlawful trade." *Cullen*, 979 F.2d at 994. The court went on to note that "[t]he removal of an instrument of the offense is not primarily an act of punishment; rather, forfeiture protects the community from the threat of continued drug dealing." *Cullen*, 979 F.2d at 994. Ultimately, the court held that "the Double Jeopardy Clause does not apply to civil forfeitures where the property itself has been an instrument of criminal activity." *Cullen*, 979 F.2d at 995. *Accord*, *United States v. Erinkitola*, 901 F. Supp. 80 (N.D.N.Y. 1995) (forfeiture of car driven to scene of drug offense

is remedial because it removes instrumentality of the crime from circulation); *Pennsylvania v. Wingait Farms*, 659 A.2d 584 (Pa. Commw. Ct. 1995) (forfeiture of horse farm remedial and not punitive, relying on *One Assortment of 89 Firearms*, 465 U.S. 354 (1984)). Similarly, in the *$405,089.23* case, Payback Mines was a front corporation through which the claimants laundered illegal drug proceeds. Thus, forfeiture of the assets of that corporation was remedial, as it simply deprived the offenders of the instrument of their crimes.

The majority of this Court in *Austin* expressly left open the possibility that some forfeitures of facilitating property may serve a remedial purpose:

> [I]t appears to make little practical difference whether the Excessive Fines Clause applies to *all* forfeitures under §§ 881(a)(4) and (a)(7) or *only to those that cannot be characterized as purely remedial*. The Clause prohibits only the imposition of "excessive" fines, and a fine that serves purely remedial purposes cannot be considered "excessive" in any event.

Austin, 113 S. Ct. at 2812 n.14 (emphasis added). Moreover, the *Halper* Court expressly noted that the government is entitled to "rough justice." As the Fifth Circuit observed in *Tilley*, the costs to the government and society from illegal drug offenses runs from $60 to $120 billion per year. *See Tilley*, 18 F.3d at 299. While it may be inequitable to "plac[e] full responsibility for the 'war on drugs' on the shoulders of every individual claimant,"[1] such national costs may be used to exhibit a "rough proportionality" between the sanction and the resulting governmental and societal costs in a particular case. *Tilley*,

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[1] *United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive*, 954 F.2d 29, 37 (2d Cir. 1992).

18 F.3d at 299. *See also Kurth*, 114 S. Ct. at 1954 (O'Connor, J., dissenting) ("[M]easuring the costs actually imposed by every participant in the illegal drug trade would be, to the extent that it is even possible, so complex as to make the game not worth the candle. Thus, the government must resort to approximation—in effect, it exacts liquidated damages." (Citation omitted)). Accordingly, in *United States v. Buchanan*, 70 F.3d 818, 830 n.12 (5th Cir. 1995), the Fifth Circuit held that forfeiture of facilitating property is not punitive if "rationally related to the governmental and societal losses associated with [defendant's] crack cocaine operation."

In *United States v. A Parcel of Land With A Building Located at 40 Moon Hill Road, Northbridge, Massachusetts*, 884 F.2d 41 (1st Cir. 1989), the First Circuit upheld the forfeiture of a 17.9 acre tract of land, including a home and other buildings, where the land was used to cultivate marijuana with the intent to distribute it. The court stated:

> Even for an infraction of the narcotics laws far smaller in magnitude than that of appellants, forfeiture of the entire tract of land upon which the drugs were produced or possessed with intent to distribute is justifiable as a means of remedying the government's injury and loss. The ravages of drugs upon our nation and the billions the government is being forced to spend upon investigation and enforcement—not to mention the costs of drug-related crime and drug abuse treatment, rehabilitation, and prevention—easily justify a recovery in excess of the strict value of the property actually devoted to growing the illegal substance. . . .

40 Moon Hill Road, 884 F.2d at 43.

Because the Courts of Appeals in these cases failed to acknowledge the remedial nature of the forfeitures at

issue here, their decisions are erroneous. Therefore, *Amici Curiae* respectfully urge this Court to reverse the decisions of the Courts of Appeals in these cases.

D. The decisions of the Courts of Appeals contravene sound public policy.

The legislature clearly intended forfeiture proceedings to supplement, rather than supplant, criminal trials. In *United States v. Furlett*, 781 F. Supp. 536 (N.D. Ill. 1991), the court explained the injustice that results from invalidating criminal penalties based upon prior civil sanctions. *Furlett*, 781 F. Supp. at 541. The court noted that the limited range of remedies available in civil proceedings does not include incarceration. Thus, if jeopardy attaches to penalties imposed in a prior civil proceeding, the government would be denied the opportunity to seek imprisonment, despite the fact that imprisonment was not even an available penalty in the civil proceeding. *Furlett*, 781 F. Supp. at 541. These same concerns apply with equal force to drug forfeitures.

Likewise, barring the government from removing the proceeds of illegal drug sales from the hands of convicted drug dealers contravenes sound public policy. A convicted criminal should not be unjustly enriched by being permitted to retain his ill-gotten gains. *See United States v. Borromeo*, 1 F.3d 219 (4th Cir. 1993) ("It is arguable that there is little justification for the position that one who successfully parlays his tainted dollar into a fortune should be permitted to enjoy a windfall. . . .") Yet that is precisely the result that will follow from the decisions of the Courts of Appeals in these cases.

Furthermore, affirmance of the decisions of the Courts of Appeals in these cases would wreak havoc on state prosecutions across the nation. For example, although the

federal government may choose to bring criminal forfeiture actions, rather than civil forfeiture actions, *see* 21 U.S.C. § 853, no such alternative exists in Illinois. Therefore, combining forfeiture proceedings with criminal prosecutions would not solve the dilemma created by the decisions of the Courts of Appeals. Combining the two proceedings would create countless problems, and drafting adequate jury instructions for a combined proceeding would be most difficult. To illustrate, in a criminal prosecution, the State must prove the elements of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 368 (1970). In a civil forfeiture action pursuant to the Illinois Drug Asset Forfeiture Procedure Act, however, once the State shows probable cause for the forfeiture of the property, the burden shifts to the claimant to establish by a preponderance of the evidence that his interest in the property is not subject to forfeiture. 725 ILCS 150/9(G) (1992). Thus, even if the State is unable to prove the criminal charge beyond a reasonable doubt, the claimant still may be unable to meet his burden to show that the property is not subject to forfeiture. If the proceedings were combined, however, the State's burden of proof on the forfeiture would effectively be raised to beyond a reasonable doubt. This result is directly contrary to the legislature's clearly expressed intent.

Other important differences between the two proceedings militate against combining them. Because a forfeiture action is civil in nature, the State is permitted to conduct discovery and take depositions, *see* Ill. S.Ct. R. 201 & 202, and the State may call the claimant as its own witness. Similarly, a claimant is not entitled to counsel in a civil forfeiture action. *See Scott v. Illinois*, 440 U.S. 367, 369-74, 99 S. Ct. 1158, 1159-62, 59 L. Ed. 2d 383, 386-89 (1979) (constitutional right to appointment of coun-

sel is generally limited to criminal proceedings which result in actual imprisonment); *see also United States v. $292,888.04 in U.S. Currency*, 54 F.3d 564 (9th Cir. 1995) (civil forfeiture is not a prosecution for purposes of Sixth Amendment right to counsel). Additionally, Illinois' Drug Asset Forfeiture Procedure Act specifically directs that the trial judge consider hearsay evidence in determining whether the State has established probable cause that the asset is subject to forfeiture, and further provides that the laws of evidence applicable to civil actions shall apply. 725 ILCS 150/9(B) (1992). Because of these crucial differences between civil forfeitures and criminal prosecutions, the proceedings necessarily must be conducted separately in accordance with the legislature's clearly expressed intent.

For all of these reasons, this Court should reverse the decisions of the Courts of Appeals and hold that the civil forfeitures in these cases do not implicate the double jeopardy clause.

CONCLUSION

The Cook County State's Attorney's Office and the National District Attorneys Association, as *Amici Curiae*, respectfully request that this Honorable Court reverse the judgments of the United States Courts of Appeals for the Sixth and Ninth Circuits and hold that the forfeitures in these cases do not implicate the Double Jeopardy Clause.

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Nos. 95-345 and 95-346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

Supreme Court, U.S.
FILED
MAR 22 1996
CLERK

UNITED STATES OF AMERICA,

Petitioner,

—v.—

GUY JEROME URSERY,

Respondent.

UNITED STATES OF AMERICA,

Petitioner,

—v.—

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, *et al.*,

Respondents.

ON WRITS OF *CERTIORARI* TO
THE UNITED STATES COURTS OF APPEALS
FOR THE SIXTH AND NINTH CIRCUITS

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS

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United States v. Jorn, 400 U.S. 470 (1971) 24

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124 Cong. Rec. 23055
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1978 U.S.C.C.A.N. 9518, 9522 15

S.Rep.No. 225, 98th Cong.,
2d Sess. 191 (1983), *reprinted in*
1984 U.S.C.C.A.N. 3364 . . . . . 9, 12, 13, 16

Other Authorities

Cheh, Mary M., "Constitutional
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Law Objectives: Understanding
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42 Hastings L.J. 1325 (1991) 24

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Lear, Elizabeth, "Contemplating the Successive Prosecution Phenomenon in the Federal System," 85 J.Crim.L. & Criminology 625 (1995) 23

Leonard W. Levy, A LICENSE TO STEAL: FORFEITURE OF PROPERTY (1996) 11

Smith, David B., PROSECUTION AND DEFENSE OF FORFEITURE CASES (1994) 24, 29

Westen, Peter & Drubel, Richard, "Toward a General Theory of Double Jeopardy," 1978 Sup.Ct.Rev. 81 20

INTEREST OF *AMICUS* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The government's aggressive use of federal civil forfeiture statutes to punish or deter conduct that is also the subject of parallel criminal proceedings threatens many constitutional values of great concern to the ACLU and its members. Multiplicitous proceedings punishing the same conduct are inherently offensive to double jeopardy principles. The government's ability to manipulate the order of parallel civil and criminal proceedings further adds to the anxiety, expense, and risk suffered by criminal defendants in many ways to be detailed below. The ACLU believes that the potential for prosecutorial overreaching cannot be curbed unless the Court declares that civil forfeiture and criminal proceedings concerning the same conduct may not be brought separately.

STATEMENT OF THE CASES

In No. 95-345, Michigan State police officers found 142 marijuana plants growing in a field adjacent to respondent Guy Ursery's property, and a small amount of marijuana paraphernalia inside his home. The United States began an *in rem* forfeiture proceeding on September 30, 1992, seeking to forfeit the Ursery family's residence pursuant to 21 U.S.C. §881(a)(7), on the theory that the residence had been used to facilitate a marijuana offense. On February 5, 1993, Ursery was charged in a one-count indictment with manufacture of marijuana in violation of 21 U.S.C. §841(a)(1).

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

The civil forfeiture action was settled by consent judgment entered on May 24, 1993; Ursery was convicted by a jury on July 2, 1993, and sentenced, on January 19, 1994, to 63 months imprisonment and four years supervised release.

In No. 95-346, respondents Charles Arlt and James Wren were tried on an indictment handed down on June 12, 1991, charging them with manufacturing methamphetamine, money laundering, and conspiracy, pursuant to 21 U.S.C. §§841, 846 & 18 U.S.C. §§371, 1956; on June 17, 1991, the United States instituted a civil forfeiture action seeking to forfeit several bank accounts and various items of personal property, some on the theory that they were proceeds of illegal narcotics transactions under 21 U.S.C. §881(a)(6), and some on the theory that they were "involved in" money laundering violations under 18 U.S.C. §981(a)(1)(A). Arlt and Wren were convicted on March 27, 1992; on April 1, 1993, the district judge presiding over the forfeiture action granted the government's summary judgment motion. 33 F.3d at 1214.

Respondent Ursery's criminal conviction was reversed by the Sixth Circuit Court of Appeals on the ground that respondent had previously been put in jeopardy for the same offense by the forfeiture proceeding, 59 F.3d 568 (1995). The judgment forfeiting respondents Arlt and Wren's property was also reversed, by the Ninth Circuit Court of Appeals, on the ground that they too had been put twice in jeopardy. 33 F.3d 1210 (1994).

SUMMARY OF ARGUMENT

The separate civil forfeiture and criminal proceedings brought by the government in both cases below violated, for several interrelated reasons, the Double Jeopardy Clause's guarantee that no one shall be put twice in jeopardy for the same offense.

First, this Court's precedents compel the conclusion that the civil forfeitures at issue in these cases constitute punishment within the meaning of the Double Jeopardy Clause. Second, the Double Jeopardy Clause bars successive punishments regardless of whether the punishments are imposed in civil or criminal proceedings. Third, the successive punishments imposed in both cases below by civil forfeiture and criminal conviction are punishments for the same offense, as this Court has defined that term in its Double Jeopardy jurisprudence.

1. This Court has firmly rejected the formalistic view that legislatures may evade otherwise applicable constitutional restrictions on criminal or quasi-criminal proceedings simply by slapping a "civil" or "*in rem*" label on its creations. For example, in *Austin v. United States*, 509 U.S. __, 113 S.Ct. 2801 (1993), a unanimous Court ruled that civil forfeiture proceedings can be punitive and therefore subject to Eighth Amendment limitations. In *United States v. Halper*, 490 U.S. 435 (1989), the Court unanimously held that civil proceedings are punishment covered by the Double Jeopardy Clause when their purposes are not solely remedial. *See also Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. __, 114 S.Ct. 1937 (1994).

Together, *Halper* and *Austin* establish a two-step analysis in double jeopardy cases. Under *Austin*, the determination of whether a particular forfeiture is punitive is made, in the first instance, by looking at the statute involved. If the history and design of the forfeiture statute reveal an intent to punish, at least in part, the Double Jeopardy Clause applies. Under *Halper*, even a forfeiture statute that is solely remedial on its face can raise double jeopardy concerns if it is punitively applied in a particular case. Here, it is unnecessary to reach the second step of the analysis because the forfeiture statutes invoked by the government -- including 21 U.S.C. §881(a)(7), the same statute at issue in *Austin* -- are

indisputably punitive, at least in part.

2. The values of the Double Jeopardy Clause are implicated whenever punishment is imposed in two separate proceedings. Two different judges preside; there are two triers of fact; issues concerning the punitive forfeiture can linger for years after a criminal verdict. The risk that the government may wear down its targets increases, particularly in light of procedural weapons, like discovery and burden of proof, that give the government powerful advantages in civil forfeiture proceedings that would be wholly unavailable in a criminal prosecution.

The Court was therefore right in *Halper* when it concluded that the Double Jeopardy Clause can bar a civil proceeding. Indeed, this Court's forfeiture cases have consistently applied a variety of constitutional guarantees outside the Sixth Amendment (which is by its terms and structure reserved to criminal "prosecutions") to ensure that such proceedings do not punish unfairly. Excessive punishment, covered in *Austin*, is not the only relevant constraint. *See, e.g., One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965)(unanimously applying Fourth Amendment exclusionary rule to forfeiture proceedings); *United States v. United States Coin & Currency*, 401 U.S. 715, 721-22 (1971)(privilege against self-incrimination, under appropriate circumstances); *Boyd v. United States*, 116 U.S. 616, 634 (1886)(same); *United States v. James Daniel Good Real Property*, 510 U.S. __, 114 S.Ct. 492 (1993)(due process notice and opportunity to be heard, absent exigent circumstances).

3. The parallel civil forfeiture and criminal proceedings in these cases did inflict double jeopardy for the same "offense" within the meaning of the Double Jeopardy Clause because the forfeiture statutes at issue subsume the underlying criminal offenses. Therefore, these multiple punish-

ments, although they would have been allowable in a single proceeding, may not be imposed in separate proceedings. To what extent the Due Process Clause would permit civil forfeiture and criminal proceedings to be joined, so that the government could enjoy the advantage of a lower burden of proof with respect to the penalty of forfeiture, is not an issue presented in this case.

ARGUMENT

I. THE CIVIL *IN REM* FORFEITURES IN THESE CASES CONSTITUTED PUNISHMENT THAT PLACED THE RESPONDENTS IN JEOPARDY WITHIN THE MEANING OF THE FIFTH AMENDMENT

The government's most fundamental objection to the decisions of the courts below is that the civil forfeitures in these cases do not constitute "punishment." Brief of the United States at 36-49. Consequently, the government claims, their imposition in cases in which the government also sought to punish the property owners criminally did not subject respondents to multiple, repetitive punishments or proceedings. The government's argument, however, is inconsistent with this Court's decisions in *United States v. Halper*, 490 U.S. 435, and *Austin v. United States*, 113 S.Ct. 2801. *See also Department of Revenue of Montana v. Kurth Ranch*, 114 S.Ct. 1937. *Halper*, *Austin*, and *Kurth Ranch* establish that Congress may not evade fundamental constitutional rules limiting punitive sanctions simply by applying a "civil" or "remedial" label to punishments for criminal conduct. This principle, essential to prevent the erosion of constitutional standards by an empty formalism, necessarily requires a more thoughtful and complex analysis of particular legislative regimes than a simplistic jurisprudence of labels. All forfeiture statutes, and even all forfeitures under the

same statutes, are not the same. But *Halper* and *Austin* establish the framework for analysis of civil forfeiture laws that should govern in these cases, protecting both the legitimate law enforcement interests underlying forfeiture statutes and the fundamental rights guaranteed by the Constitution.[2]

A. Under *Halper* And *Austin*, Forfeiture Provisions That Are Not Solely Remedial In Intent And Effect Impose Punishment For Purposes Of The Double Jeopardy Clause

In *Halper*, this Court unanimously recognized that a civil penalty may constitute punishment for purposes of the Double Jeopardy Clause. The Court expressly rejected any claim that the "civil" or "criminal" label attached to a proceeding or remedy is of great importance in determining whether a person subjected to it is placed in "jeopardy." 490 U.S. at 447-48. The core holding of *Halper* was that

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[2] This Court's approach to the problem of forfeiture and double jeopardy has fluctuated over time. *Coffey v. United States*, 116 U.S. 436 (1886), held that an acquittal in a criminal case precluded a later civil *in rem* forfeiture action. In *United States v. 89 Firearms*, 465 U.S. 354 (1984), the Court overruled *Coffey*, assuming that the Double Jeopardy Clause is not applicable unless "the proceeding is essentially criminal in character," 465 U.S. at 362, and applying the factors set out in *United States v. Ward*, 448 U.S. 242 (1980), and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), for determining when nominally civil proceedings are properly characterized as "criminal." *Halper* established current law by rejecting the *89 Firearms* approach, specifically declining to use the *Kennedy/Ward* test to define the coverage of the Double Jeopardy Clause. In *Austin*, 113 S.Ct. at 2806 n.6, the Court also rejected the *Kennedy/Ward* test as a definition of punishment for Eighth Amendment purposes. *See also Kurth Ranch*, 114 S.Ct. at 1944-48 (using the *Halper* methodology to determine what is punishment for purposes of the Double Jeopardy Clause).

the Double Jeopardy Clause prohibits separate civil and criminal penalties for the same offense "to the extent that the [civil] sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." *Id.* at 448-49.

Halper dealt with a liquidated damages provision fixing a specific, minimum recovery for the government in a civil action to recover for false claims made by a service provider. The basic legislative scheme in *Halper* was concededly remedial, closely resembling familiar liquidated damages provisions in private contracts. Nevertheless, the Court held that when the penalty set by the statute was grossly disproportionate to the actual damages suffered by the government, the penalty could no longer be considered purely remedial, even allowing for the "inevitabl[e] . . . rough justice" quality of liquidated damages provisions. *Id.* at 449. Though the statutory provision was intended to be remedial, under a case-by-case "rule . . . of reason," a court could determine, by an accounting of the government's actual "damages and costs" that, as applied to a particular situation the compensatory rationale had been exceeded, and the penalty "cross[ed] the line between remedy and punishment." *Id.* at 449-50.

Austin analyzed the distinction between the remedial and the punitive in the very different context of civil forfeitures resulting from narcotics crimes. Once again, the Court was unanimous, this time in holding that the Excessive Fines Clause of the Eighth Amendment applied to civil forfeitures under one of the very statutes at issue in this case, 21 U.S.C. §881(a)(7). As in *Halper*, the Court ruled that the issue was not whether a forfeiture served *some* remedial purpose. Rather, a forfeiture contained a punitive element, and was subject to the constitutional limitation on punishment, so long as its purposes and effects were not *entirely* remedial: "'[A] civil sanction that cannot fairly be said *solely* to serve a remedial function . . . is punishment." 113

S.Ct. at 2806, quoting *Halper*, 490 U.S. at 448 (emphasis added).[3]

The *Austin* Court pointed out that its precedents had "consistently recognized that forfeiture serves, at least in part, to punish the owner." 113 S.Ct. at 2810.[4] Moreover, and of critical importance, the Court analyzed the specific nature and purposes of the particular forfeiture provisions before the Court -- those provided in 21 U.S.C. §§881(a)(4) and (a)(7) -- and concluded that these particular forfeiture provisions bore specific indicia of serving the classically punitive purposes of retribution and deterrence.

First, the drug forfeiture provisions contain an innocent owner defense, thus "focus[ing] the provisions on the culpability of the owner." *Austin*, 113 S.Ct. at 2810-11. Second, Congress chose "to tie forfeiture directly to the commission of drug offenses," making the property forfeitable not because of its nature but because of its particular relation to the commission of a *criminal* offense. *Id.* at 2811. Third, in enacting these particular forfeiture provisions, Congress expressly intended them to supplement "the traditional criminal sanctions of fine and imprisonment," which it found "inadequate to deter or punish" drug traffickers. *Id.*, citing S.Rep.No. 225, 98th Cong., 2d Sess. 191 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3364.

The government argues that the analyses of *Halper* and *Austin* are radically distinct and that, for purposes of the Double Jeopardy Clause, as opposed to the Excessive Fines Clause, the questions of whether a forfeiture is punitive must be decided by a "case-by-case inquiry," as in *Halper*, rather than "categorical[ly]," as in *Austin*. Brief of the United States at 13-14. The government is wrong. The case-by-case analysis in *Halper* is not a substitute for, but an addition to, the categorical approach of *Austin*. The different emphases in *Halper* and *Austin* are attributable not to the different constitutional clauses involved, but to the different statutory schemes at issue. Specifically, the statutory penalty in *Halper* was not in itself punitive because it was expressly designed as remedial and compensatory. The issue therefore became whether such a statute, as applied to *Halper*'s particular facts, could exceed its remedial purposes and become punitive. The statutory penalty at issue in *Austin*, on the other hand, was inherently punitive -- it had no nongovernmental civil analogue and had been specifically intended by Congress to serve in large part as punishment. Moreover, forfeitures (unlike liquidated damages) are the closest to criminal punishments of all civil penalties, and have long been recognized as at least "quasi-criminal in character." *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. at 700 (by a unanimous Court); *see also Boyd v. United States*, 116 U.S. at 634.[5]

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[3] *Austin* and *Halper* are clearly correct in holding constitutional limitations on punishment applicable to penalties that are not *entirely* remedial. The Double Jeopardy and Excessive Fines Clauses do not contain exceptions authorizing multiple or excessive punishments so long as those punishments are packaged together with civil or remedial monetary awards. If a governmental action serves as a punishment, even in part, the punitive component of that action must be imposed in accordance with constitutional standards.

[4] The Court's *dicta* on this issue have not been entirely consistent. The majority opinion in the Court's recent decision in *Bennis v. Michigan*, No. 94-8729, 1996 WL 88269 (March 4, 1996), emphasizes portions of the case law that highlight the remedial aspects of traditional forfeitures. The *Austin* opinion, however, authoritatively demonstrates that the Court has at least as often recognized that the "civil" quality of forfeitures is often largely fictional. 113 S.Ct. at 2808-10.

[5] In analyzing the double jeopardy claim in *89 Firearms*, 465 U.S. 354, a case on which the government otherwise heavily relies, the Court's unanimous opinion did not ask whether the particular forfeiture at issue

(continued...)

Taken together, then, *Halper* and *Austin* establish three basic principles: First, and most importantly, the "punishment" issue cannot be determined by labels. The denomination of a penalty as "civil" or "*in rem*" does not prevent that penalty from being a "punishment" which, under the Double Jeopardy Clause, can only be imposed once for the same offense. Second, a penalty is punishment if it cannot fairly be characterized as solely remedial in its application. Third, particular penalties enacted by Congress can be identified, on the basis of their characteristics and the legislative purpose behind their adoption, as intrinsically serving punitive purposes. These principles should dictate the determination of whether the forfeitures imposed on respondents here constituted punishment.

B. The Forfeitures In The Instant Cases Are Punitive

The government's attribution of remedial purposes to the forfeitures in question ignores the nature and legislative

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[5] (...continued)
imposed a financial burden that exceeded some putative "cost" to the government of the crime at issue. Rather, exactly as in *Austin*, it examined the particular forfeiture *statute* at issue and found it to be remedial (intended to "further the prophylactic purposes of the 1968 gun control legislation . . . . Keeping potentially dangerous weapons out of the hands of unlicensed dealers is a goal plainly more remedial than punitive"). 465 U.S. at 364. Unlike the forfeitures at issue in this case, the firearms forfeiture provisions have never been characterized as, and do not have the effect of, imposing heavy financial penalties on criminals. Similarly, in *Kurth Ranch* the Court did not assess whether Montana's marijuana tax, as applied to Kurth, was in excess of some appropriate "remedial" tax amount, but instead examined the attributes and purposes of the tax scheme to decide that the tax was intrinsically punitive. *89 Firearms* and *Kurth Ranch* are inconsistent with the government's effort to depict *Halper* as imposing a rigid case-by-case methodology from which *Austin* supposedly departed.

history of the particular forfeiture provisions at issue, constructing instead an entirely hypothetical set of nonpunitive purposes derived from other applications of completely different forfeiture statutes.

The purposes, scope, incidents and utilization of forfeiture have changed dramatically over time. *See generally* Leonard W. Levy, A LICENSE TO STEAL: FORFEITURE OF PROPERTY 1-81 (1996). Just as Congress may not escape limitations imposed by the Constitution by labeling proceedings "civil," so this Court should not misuse history by noting that *in rem* forfeiture was familiar to the framers, and then concluding that whatever Congress chooses to label an *in rem* forfeiture would have been recognized as such by James Madison. The forfeitures in the cases before the Court include *modern* innovations that cannot be passed off as traditional anomalies that, for historical reasons, may receive a free pass from constitutional scrutiny, for they differ "not only in degree, but in kind, from [their] historical antecedents." *United States v. James Daniel Good Real Property*, 114 S.Ct. at 515 (Thomas, J., concurring in part and dissenting in part). All forfeitures are not created equal, and the characterization of a forfeiture as punitive or remedial will depend on the nature of the particular forfeiture involved.

Many forfeitures have obviously remedial purposes. Forfeitures of contraband, for example, and forfeiture of many types of instrumentality of crime, will often have the remedial purpose of removing dangerous items from circulation. Narcotics, for example, may be seized, forfeited and destroyed by the government because it is illegal and dangerous for any unauthorized person to possess them. Smuggled goods are a special form of contraband in that they may not lawfully be possessed in this country until the customs duty is satisfied, regardless of the culpability of the person possessing the goods. Weapons, burglar tools, and

alcoholic beverages, and the component parts or substances used to make them, may be declared forfeit when they are used in the commission of a crime, not simply as a supplement to fines or imprisonment, but because such items are dangerous and therefore subject to remedial regulation of their possession and use. Moreover, the punitive component of such forfeitures is minimal, given the relatively low legitimate value of such items. The vast majority of this Court's cases dealing with forfeiture, and particularly the early cases relied upon to provide historical validation for the supposed remedial underpinnings of civil forfeitures generally, deal with forfeitures of this kind.

But neither of the forfeitures now before the Court stems from such traditional uses of forfeiture. The statute at issue in *Ursery* (No. 95-345), 21 U.S.C. §881(a)(7) -- the very statute found in *Austin* to have a punitive purpose -- was first enacted in 1984, as part of the Comprehensive Crime Control Act of 1984, Pub.L.No. 98-473, 98 Stat. 1837. While the government before this Court solemnly invokes the traditional purposes of *in rem* forfeiture of property, such as inducing owners of property to use care, abating a nuisance, and "insuring an indemnity to the injured party," Brief of the United States at 44-45, these supposedly remedial objectives are nowhere mentioned in the legislative history. The Senate Report accompanying the Act rarely distinguishes between civil and criminal forfeiture, referring repeatedly and indiscriminately to "forfeiture" as an additional sanction to "deter or punish" lucrative crimes for which "the traditional criminal sanctions of fine and imprisonment are inadequate." S.Rep.No. 225, *supra*, at 191. The particular provision extending civil narcotics forfeitures to real property used in furtherance of narcotics crimes, and the new amendments to the *criminal* forfeiture provisions of RICO to include forfeiture of the proceeds of RICO violations, are described as two aspects of an initiative to realize

"the full law enforcement potential of forfeiture" by increasing the extent of asset seizures, *id.* at 194-95. Moreover, the same 1984 legislation that added the real property subsection to the narcotics *civil* forfeiture statute expanded the *criminal* forfeiture provisions, formerly limited to continuing criminal enterprise cases, to cover all narcotics felonies, *see* Pub.L.No. 98-473, *supra*, §303, and also, like the newly enhanced civil forfeiture provision, to include forfeiture of real estate. *See, e.g.*, S.Rep.No. 225, *supra*, at 211. Thus, the very forfeiture provisions touted here by the government as remedial were designed by Congress as means of punishing and deterring criminal conduct.[6]

In light of this history, it simply defies reality for the government to claim that forfeitures of narcotics offenders' real property pursuant to such a statute are not at least partially punitive in nature.[7] Nor would a serious application of the government's proposed "case-by-case" analysis lead to a different result. This is not a case, like those cited by the government, in which the property constituted a public nuisance because the entire premises constituted an open and notorious drug market. *Cf. United States v. 141st Street*

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[6] Significantly, under the parallel criminal forfeiture provision enacted in tandem with §881(a)(7), respondent Ursery's property could have been forfeited criminally, as part of the same proceeding in which he was charged with criminal conduct, *see* 21 U.S.C. §853(a)(2). That the government chose, presumably for tactical reasons, to undertake two separate proceedings does not erase the clear punitive aspect of this forfeiture.

[7] Since *Ursery* and *Austin* involve the same statute, the observations of the *Austin* Court concerning the close link between the forfeiture and the commission of crime, and the availability of the innocent-owner defense, 113 S.Ct. at 2810-11, apply to this case as well. *See also Good*, 114 S.Ct. at 515 (Thomas, J., discussing the same statute).

Corp., 911 F.2d 870 (2d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991), cited in Brief of the United States at 44 n.12. Any claim that Ursery's home constituted a public danger or nuisance, either intrinsically or under his ownership, is defeated by the fact that the government chose to allow Ursery to *retain* ownership of the home, settling the forfeiture case for a financial payment. *See* 59 F.3d at 570. The effect of the supposedly "remedial" action was thus neither more nor less than to impose a fine on Ursery for misusing his property.[8]

In *$405,089.23* (No. 95-346), the government sought forfeiture of "proceeds" and property "involved in" money laundering violations pursuant to 21 U.S.C. §881(a)(6) and 18 U.S.C. §981(a)(1)(A). Like §881(a)(7), these statutes are hardly time-honored features of common-law jurisprudence. As even the government concedes, "[s]tatutes providing for forfeiture of proceeds of criminal activity do not share the historical pedigree of other *in rem* forfeitures." Brief of the United States at 14.

The first forfeiture provision explicitly permitting the forfeiture of the proceeds of narcotics transactions was the *criminal* forfeiture provision of 21 U.S.C. §848, adopted as §408 of Pub.L.No 91-513, 84 Stat. 1236, the Comprehensive Drug Abuse Prevention and Control Act of 1970. Section 511 of the same Act adopted a civil forfeiture regime for various categories of property, now essentially codified

[8] The government here did not seek to punish a drug dealer, and then seek to "remedy" the carelessness of a property owner who tolerated his activity, *see Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *see also Bennis v. Michigan*, 1996 WL 88269. This case -- like any case that will present double jeopardy problems due to parallel civil and criminal proceedings -- involves a two-fold punishment of the same actors for engaging in criminal conduct on or with their property.

in 21 U.S.C. §§881(a)(1) - (a)(5). But the proceeds provision of §881(a)(6) was not added until 1978, in "an important expansion of governmental power." *United States v. 92 Buena Vista Avenue*, 507 U.S. 111, 121 (1993). The Joint Explanatory Statement submitted to Congress with this bill expressly recognized "the penal nature of forfeiture statutes," 1978 U.S.C.C.A.N. 9518, 9522, and made no reference to the *post hoc* claim of the government and of some lower courts that forfeitures of proceeds are remedially intended to repay the government for the costs of prosecution. Brief of the United States at 44-46. Rather, the provision was passed by the Senate following a speech by its sponsor urging that:

> The criminal justice system can only be effective if there is a meaningful deterrent . . . The amendment I propose here today is intended to enhance the efforts to reduce the flow of illicit drugs in the United States by striking out against the profits from illicit drug trafficking . . . . Thus, the punitive and deterrent purposes of the Controlled Substances Act would have greater impact on drug trafficking.[9]

As noted above, in 1984 substantially identical criminal forfeiture provisions were added, giving the government the

[9] 124 Cong. Rec. 23055 (July 27, 1978)(remarks of Sen. Nunn). Similarly, the House was urged to accept this expansion of civil forfeiture on the ground that it would be "an extremely important weapon against the financial backers of illegal drug trafficking since it reaches them where it hurts the most. No longer will the big-money men of illegal drugs be able to hide their ill-gotten profits with impunity." 124 Cong. Rec. 36949 (Oct. 13, 1978)(remarks of Rep. Wolff). Since the forfeiture provision was added to another bill on the floor of the Senate, the quoted remarks constitute essentially the only explanations provided to the Congress of the purpose and import of the provision.

choice of proceeding in a single criminal action if it chose to do so. The legislative history does not suggest that Congress envisioned the new criminal forfeiture of proceeds as playing any different role than civil forfeitures -- the criminal alternative was simply seen as a "more efficient method of obtaining the forfeiture of assets of drug defendants" in certain circumstances. S.Rep.No. 225, *supra*, at 197.

The money laundering forfeiture provisions of 18 U.S.C. §981 were first enacted in 1986, as part of the same legislation that created the criminal money laundering provisions of 18 U.S.C. §§1956 and 1957, and the attendant criminal forfeiture provisions of 18 U.S.C. §982. Today, after extensive expansions and amendments, the civil and criminal forfeiture provisions relating to money laundering are substantially identical. As in *Ursery*, the government could have sought forfeiture of the same property it seeks here as part of a single proceeding, by invoking the criminal forfeiture provisions of §982, instead of bringing a separate civil action under §981. Like the narcotics civil forfeiture provisions, moreover, §981 focuses on the culpability of property owners by including an innocent owner defense. 18 U.S.C. §981(a)(2).[10]

The government nevertheless argues that stripping drug dealers of the proceeds of crime is not punitive, because it is designed to "prevent unjust enrichment," Brief of the United

[10] The history, nature, and purposes of the narcotics forfeiture provisions at issue here entirely distinguish *Bennis v. Michigan*, 1996 WL 88269. That case concerned a statute that was expressly constructed to deal with a traditional remedial goal of forfeiture: the abatement of public nuisances created by the use of property for purposes of keeping brothels. As Justice Thomas pointed out, the treatment of forfeitures as remedial should be "strictly" limited, "adhering to historical standards." *Id.* at *8 (Thomas, J., concurring).

States at 47-48, or because "proceeds forfeiture can never be out of proportion to the 'loss' suffered by the government or society." *Id.* at 49, quoting *Smith v. United States*, No. 95-2259, 1996 WL 72858, at *3 (7th Cir. Feb. 21, 1996). But this is sophistry. It may well be that a fine or forfeiture that is limited to the profit a criminal has made from crime cannot be constitutionally disproportionate or excessive, or even that such a fine or forfeiture is inadequate punishment to constitute an effective deterrent. But a weak or insufficient punishment is still *punishment*. Until the government's recent quest to rationalize its position on civil forfeitures, no one would ever have claimed that the generally inadequate fines that characterized federal criminal law until the 1980's did not constitute punishment because they often did not suffice to make crime financially unprofitable.

Forfeiture of criminal proceeds was brought into the law as part of RICO and the continuing criminal enterprise statutes precisely because existing financial sanctions were inadequate as punishment, which must at least remove the profits from crime regardless of whatever additional sanctions may then be imposed. *See Russello v. United States*, 464 U.S. 16, 25 (1983).

The government's attempt to recast punitive sanctions as a *Halper*-like "liquidated damages" provision, intended to "compensate" the government for the "social costs" of crime, is equally unavailing. Crimes like those of respondents surely impose a social cost. But it is the very essence of criminal punishment that it is directed not at the private compensation of individual victims for the harms they suffer through crime, but at retribution for the more generalized harm to the social order inflicted by criminals. In *Halper* the government sought, at least in part, compensation for specific harm to its proprietary interests. When the government seeks a "remedy" for the social damage inflicted by

drug dealers, it is engaged in the classically retributive and deterrent exercise of criminal punishment.

Once again, the government's proposed "case-by-case" methodology would yield the same results as a more categorical analysis. Where, as here, the forfeiture of proceeds is sought from the very person who is separately charged with the crime that generated them, the forfeiture results directly from the commission of the crime charged. Moreover, as the court of appeals recognized, the forfeitures in *$405,809.23* were not calibrated to strike only a "remedial" blow at traceable "proceeds" of specific crimes, but indiscriminately confiscated all of respondents' valuable assets under an amalgam of forfeiture statutes -- a clear signal that the forfeitures operated to punish respondents for their crimes. 33 F.3d at 1220 n.11.

No fair reading of the history of modern forfeiture statutes can portray the principal purpose of the statutes at issue here as anything but punitive. At the very least, the history shows that these statutes are not "solely remedial." Moreover, like the forfeitures found punitive in *Austin*, the forfeitures here are closely linked to (and indeed depend upon) the commission of crimes by respondents, and are based on statutes that focus on culpability by providing an innocent owner defense. The goal of these statutes is not to promote public safety by removing contraband or dangerous instrumentalities from circulation, or to abate nuisances. It is to take the profit out of crime, by stripping criminals of their ill-gotten gains. This is unquestionably a legitimate and desirable goal for Congress to pursue; but it is a *punitive* goal. As such, it should be subject to the limitations imposed by the Constitution on the power to punish.

II. THE DOUBLE JEOPARDY CLAUSE PROHIBITS THE GOVERNMENT FROM SEEKING IMPOSITION OF PUNISHMENT IN SEPARATE CIVIL FORFEITURE AND CRIMINAL PROCEEDINGS BASED ON THE SAME OFFENSE

A. This Court's Precedents And The Fifth Amendment Itself Establish That The Double Jeopardy Clause Prohibits Multiple Punitive Proceedings, Not Only Multiple Prosecutions

In *Abbate v. United States*, 359 U.S. 187, 198-99 (1959), this Court explained:

> The basis of the Fifth Amendment protection against double jeopardy is that a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts.

Respondents Ursery, Arlt and Wren suffered precisely the harms the Double Jeopardy Clause seeks to prevent: they were required to "run the gauntlet" more than once for the same offense, "thereby subjecting [them] to embarrassment, expense and ordeal and compelling [them] to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent [they] may be found guilty." *Green v. United States*, 355 U.S. 184, 187-88, 190 (1957). They also confronted two different judges and two different triers of fact in the repeated attempts to punish them.[11]

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[11] Two different judges presided over the parallel civil and criminal proceedings below, *see Ursery*, 59 F.3d at 569-70; *$405,809.23*, 33 F.3d at

(continued...)

The Double Jeopardy Clause does not provide that an individual may not be "prosecuted" twice, as the government argues, Brief of the United States at 16-36, but that an individual shall not be "subject for the same offence to be put twice in jeopardy of life or limb." U.S. Const. amend. V. As argued in Point I, *supra*, *Halper* and *Kurth Ranch* establish that "jeopardy" refers to risk of any punitive governmental action, and not just "criminal" punishment within the meaning of the *Kennedy/Ward* test. *See* n.2, *supra*. As long ago as *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874), this Court refused to read the apparently limiting "life or limb" language as restricting the scope of the Double Jeopardy Clause's prohibition of multiple punishments. So long as the Clause applies to modern punishments like incarceration and fines at all, its reach must extend to "civil" imposition of these sanctions, as *Halper* held.

This Court's interpretation is supported by the structure of the Bill of Rights. Had the framers of the Double Jeopardy Clause wished to limit the sweep of that provision, they could have positioned the Clause in the Sixth Amendment, which governs only "criminal prosecutions," rather than in the Fifth Amendment, whose protections are not all so limited.[12] Forfeiture proceedings may not command

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[11] (...continued)
1216. Had the forfeiture proceedings gone to trial (instead of being settled in *Ursery* and decided on summary judgment in *$405,809.23*), respondents would have confronted a second round of jury selection and decision. One central purpose of the Double Jeopardy Clause is to protect a defendant's Sixth Amendment right to jury trial by respecting the finality of jury verdicts and not allowing the government a second attempt to select a congenial trier of fact. *See* Peter Westen & Richard Drubel, "Toward a General Theory of Double Jeopardy," 1978 Sup.Ct. Rev. 81, 122-32.

[12] Each clause of the Fifth Amendment declares the extent of its own ap-
(continued...)

Sixth Amendment-based criminal procedures under the *Kennedy/Ward* test, but this Court has consistently applied constitutional guarantees outside the Sixth Amendment to these "quasi-criminal" proceedings. *See, e.g., One 1958 Plymouth Sedan*, 380 U.S. 693 (Fourth Amendment exclusionary rule); *Austin*, 113 S.Ct. at 2804 n.4 (Eighth Amendment Excessive Fines Clause); *Good*, 114 S.Ct. at 504 (Due Process Clause guarantees of notice and opportunity to be heard).

The *dicta* on which the government relies for the proposition that a "prosecution" is a prerequisite to double jeopardy protection, Brief of the United States at 17, not surprisingly, predate the decisions in *Halper*, *Austin* and *Kurth Ranch*. In these earlier decisions, the Court had assumed that the evils the Double Jeopardy Clause deplores could only take place if the government (1) brought successive criminal prosecutions, or (2) either exceeded the legislatively prescribed punishment or acted vindictively in a particular case. *See Halper*, 490 U.S. at 440. *Halper* can be described as supplementing this list in order to prevent prosecutors and legislatures from inflicting the harms the Double Jeopardy Clause has always prohibited through innovative use of "civil" proceedings. After *Halper*, it no longer makes sense to say that the Double Jeopardy Clause prevents the

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[12] (...continued)
plicability. The right to indictment by grand jury is, of course, limited by its own explicit terms to criminal cases; the Takings Clause and Due Process Clause just as clearly are not.

The privilege against self-incrimination includes apparently limiting language ("nor shall be compelled *in any criminal case* to be a witness against himself")(emphasis added). Nevertheless, because the damage the privilege aims to prevent may flow from a civil proceeding, this Court has held that the privilege may also be invoked during a civil proceeding, including a civil forfeiture proceeding, by a person seeking to avoid "incrimination." *See United States v. United States Coin & Currency*, 401 U.S. at 721-22; *Boyd*, 116 U.S. at 634.

discrete injuries of multiple prosecutions *or* multiple punishments. Multiple punitive proceedings are prohibited, even if they do not precisely fit one of the two prongs of the previous *dicta*.

History does not justify discarding the unanimous conclusions of *Halper* and *Austin*. Even if the framers of the Constitution had been willing to countenance some successive forfeiture and criminal proceedings concerning traditional subjects of common law forfeiture, the modern narcotics and money laundering forfeiture statutes at issue here bear little resemblance to common law forfeiture. *See* Point I, *supra*. Congress may indeed avoid the strictures of criminal procedure by creating civil forfeiture as a weapon, but if a prosecutor chooses to use this weapon in *addition* to criminal penalties, that prosecutor must respect not only the Eighth Amendment restriction on excessive punishment, but also the Fifth Amendment prohibition of multiple punitive proceedings.[13] The limitation is not directed at the legislature so much as at the prosecutor.

Whether Congress itself intended to authorize successive forfeiture and criminal proceedings is not relevant to double jeopardy analysis. Congress is certainly entitled to deference when it defines what constitutes an "offense," *see Missouri v. Hunter*, 459 U.S. 359 (1983), and may, by defining separate offenses, afford prosecutors the discretion to bring

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[13] Just because forfeiture proceedings have historically been accompanied by unfair procedures is not a sufficient reason for the courts to refuse to measure those proceedings against our current constitutional definitions of fairness. In *Good*, Justice O'Connor agreed that the Court must use modern due process calculus in evaluating the constitutionality of the procedures of civil forfeiture "notwithstanding its historical pedigree." 114 S.Ct. at 513 (concurring in part and dissenting in part). *See also id.* at 515 (Thomas, J.)("it may be necessary -- in an appropriate case -- to reevaluate our generally deferential approach to legislative judgments in this area").

even successive criminal prosecutions. *See United States v. Dixon*, 509 U.S. __, 113 S.Ct. 2849 (1993). However, Congress may no more decide to allow prosecutors to bring multiple punitive proceedings for what it has already defined as the "same offense," *see United States v. 9844 South Titan Court*, 75 F.3d 1470, 1490-91 (10th Cir. 1996); Elizabeth Lear, "Contemplating the Successive Prosecution Phenomenon in the Federal System," 85 J.Crim.L. & Criminology 625, 628 n.18 (1995), than it may unilaterally declare that its actions are not "punitive."[14]

Like its approach to the question of what constitutes punishment, the government proposes that the Court also limit itself here to a narrow case-by-case approach restricted to asking whether government actors in these particular cases were "vindictive" in pursuing multiple punitive proceedings. Brief of the United States at 27. But vindictiveness is not the only, or even the principal danger posed when the government has a quiver full of methods of seeking punishment. Regardless of the purity of their motives, if government attorneys are permitted to seek otherwise allowable penalties independently and sequentially, they may thereby exhaust a property owner's resources and will, and consequently increase the risk of punishing the innocent.

This potential for abuse is inherent in all instances where the government seeks forfeiture and criminal penalties

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[14] The Court has recognized in many other areas that, while deference to the legislature plays an important role in some aspects of constitutional interpretation, under fundamental principles of judicial review, the legislature cannot be given the final power to decide when constitutional guarantees apply. In the procedural due process area, for example, legislatures may decide whether or not to create entitlements to liberty or property, but the courts must then decide what process is due to protect whatever entitlements the legislature creates. The legislature may not choose what procedures will apply. *See, e.g., Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532 (1985).

in parallel proceedings. *See* David B. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES at 10.01 (1994); Mary M. Cheh, "Constitutional Limitations on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction," 42 Hastings L.J. 1325, 1389-98 (1991). The government has vast power to use sequencing of the two proceedings in whatever way will most disadvantage the defendant/claimant, who does not even have the benefit of a constitutional right to counsel in connection with the forfeiture proceeding. *See* Smith, *supra*, at 11.0. In forfeiture proceedings under §881 and other statutes, the government may conduct discovery against the defendant/claimant, who may assert the privilege against self-incrimination only to find that he has lost his property as the price of defending his liberty. *See* Cheh, *supra*, at 1384-89. The government may litigate the forfeiture action first if it wishes to strip a prospective defendant of assets to hire criminal defense counsel, *see Caplin & Drysdale, Chtd. v. United States*, 491 U.S. 617 (1989), or may stay the forfeiture action if it prefers to avoid having to respond to the claimant's reciprocal discovery requests, *see* 21 U.S.C. §881(1). If the defendant is convicted in the criminal action, the government may move for summary judgment, as it did in *$405,089.23*; if the defendant is acquitted, the government may proceed with the forfeiture action nevertheless, under cover of the different burdens of proof involved. *89 Firearms*, 465 U.S. at 366. Because two different prosecutors, often from different offices, represent the government in the parallel proceedings, *see Ursery*, 59 F.3d at 575, claimant/defendants are unlikely to be able to "once and for all . . . conclude their confrontation with society," *United States v. Jorn*, 400 U.S. 470, 486 (1971), at the time of the jury's verdict. Like respondents Arlt and Wren, they may find themselves defending their property for a full year or more after resolution of their criminal case, *see* 33 F.3d at 1214. Respondents Ursery,

Arlt and Wren did not even have the benefit of having the same judge presiding over the interplay of the parallel proceedings to ensure that the government did not abuse its unilateral powers, *see Ursery*, 59 F.3d at 569-70; *$405,809.23*, 33 F.3d at 1216. Successive proceedings also increase the danger that, although innocent, a defendant might be punished nevertheless, because the government has the opportunity to rehearse its case and to use what it learns from the defense in the first proceeding to win the second.

Virtually every federal court of appeals to have examined the question has agreed with the Sixth and Ninth Circuits that permitting the government to separately pursue criminal penalties and civil forfeiture penalties amounting to "punishment" violates the Double Jeopardy Clause. *See United States v. 9844 South Titan Court*, 75 F.3d at 1482-86 (10th Cir.); *United States v. Torres*, 28 F.3d 1463, 1465 (7th Cir.), *cert. denied*, 115 S.Ct. 669 (1994); *United States v. Tilley*, 18 F.3d 295, 297 (5th Cir.), *cert. denied*, 115 S.Ct. 574 (1994); *United States v. One Single Family Residence Located at 18755 North Bay Road, Miami*, 13 F.3d 1493 (11th Cir. 1994); *United States v. Millan*, 2 F.3d 17 (2d Cir. 1993), *cert. denied*, 114 S.Ct. 922 (1994). Because the gravamen of the violation is that the government gives itself two bites of the apple, the relative timing of the two proceedings cannot determine whether there has been a double jeopardy violation.[15] Therefore, because the forfeiture proceedings in these cases were punitive, the government was not permitted to pursue multiple proceedings if both proceedings involved the "same offense."

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[15] *See Kurth Ranch*, 114 S.Ct. at 1958 (Scalia, J. dissenting); *Brown v. Ohio*, 432 U.S. 161, 168 (1977). When jeopardy attached in each proceeding only matters with respect to deciding which of the two parallel proceedings must be vacated, but not to whether one or the other must be.

B. The Civil Forfeiture Actions And The Criminal Prosecutions In These Cases Are Proceedings Punishing The "Same Offense"

In both cases below, the government sought a punitive forfeiture of property belonging to criminal defendants in a parallel civil proceeding based on all or substantially all of the same conduct prosecuted in the respective criminal cases. Because forfeitures are not usually classified as "offenses," *see Libretti v. United States*, __ U.S. __, 116 S.Ct. 356 (1996), in that they define forms of punishment rather than criminal conduct, the Tenth Circuit has suggested that Double Jeopardy analysis should take a different form in parallel proceeding cases. *9844 South Titan Court*, 75 F.3d at 1488-89. The classic *Blockburger* test measuring when two "offenses" are covered by the Double Jeopardy Clause -- "whether each provision requires proof of a fact which the other does not," *Dixon*, 113 S.Ct. at 2856, quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932) -- can nevertheless be applied here. Once again, labels like "offense" are less significant than the purposes of the constitutional guarantee at issue.

As demonstrated in *Dixon*, the *Blockburger* test requires an abstract comparison of the elements of the distinct offenses. In *Dixon*, the Court also confirmed that, as in *Harris v. Oklahoma*, 433 U.S. 682 (1977)(*per curiam*), a sanction imposed for violating one crime through the commission of an incorporated offense can be barred by double jeopardy "even without specifying the latter's elements." *Grady v. Corbin*, 495 U.S. 508, 528 (1990)(Scalia, J., dissenting); *Dixon*, 113 S.Ct. at 2857. The Court in *Harris* examined a felony-murder statute that did not necessarily include the particular separately charged predicate felony because its language permitted any number of felonies to qualify as the predicate offense. In *Dixon*, the criminal con-

tempt statute the Court reviewed essentially incorporated the entire penal code.

The forfeiture statutes at issue here speak in terms of "violations of this subchapter," 21 U.S.C. §§881(a)(6) and (7), or "involved in violations" of specific provisions of title 18, 18 U.S.C. §981(a)(1)(A). As in *Harris* and *Dixon*, these forfeiture statutes subsume the underlying criminal charges so that forfeiture cannot be ordered without proof of the underlying criminal offense. None of the federal courts of appeals to have considered the question disagrees with the Sixth and Ninth Circuits on this point either. *See, e.g., 9844 South Titan Court*, 75 F.3d at 1489-90 (10th Cir.); *Tilley*, 18 F.3d at 297-98 (5th Cir.); *One Single Family Residence*, 13 F.3d at 1495 (11th Cir.).[16]

Some forfeitures will survive the *Blockburger* test -- if the forfeiture complaint alleges different crimes than those for which defendant was prosecuted, if an owner has allegedly intended to use property in connection with an offense but has not yet committed or attempted that offense, or if the owner is simply not being prosecuted and therefore has no double jeopardy problem. In both of the cases before the Court, however, the criminal defendant and the claimant were identical, all or at least some of the indicted crimes served as the predicate offenses for the forfeiture, and the only additional element required to be proven related to the role of the property in the offense.

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[16] The government's mode of proceeding in parallel forfeiture/criminal cases highlights the interlocking relationship of proceedings based on the same underlying substantive offenses. Following the conviction of respondents Arlt and Wren, the government moved for summary judgment in its forfeiture action. 33 F.3d at 1214. In some cases, the government incorporates the actual criminal indictment by reference in the civil forfeiture complaint. *See, e.g., Millan*, 2 F.3d at 18.

C. Criminal Punishment And The Punitive Forfeitures Sought In These Cases May Both Be Imposed Only During The Same Proceeding, With The Same Judge Presiding And The Same Trier Of Fact

The Sixth Circuit was clearly correct in ruling that the government's failure to seek the available punishments in a "single coordinated proceeding" led to a double jeopardy violation.[17] The Ninth Circuit was also correct in observing that the government could have avoided this problem by seeking criminal forfeiture under the criminal indictment. 33 F.3d at 1216-17. While *amicus* believes that it would be preferable for the government to have utilized criminal forfeiture in these cases, this Court need not decide in the context of this case whether to agree with the Ninth Circuit that the government is *always* required to choose between civil forfeiture and criminal prosecution.

It may indeed be possible for a civil forfeiture proceeding and a criminal prosecution to be joined in the same proceeding, as the Sixth Circuit believed, 59 F.3d at 575, *see, e.g.*, *United States v. Certain Real Property*, 972 F.2d 136 (6th Cir. 1992); *United States v. Real Property*, 816 F.Supp. 1077, 1085 (E.D.Va. 1993), as long as the two proceedings are assigned to the same judge and provide the defendant

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[17] The notion of the Second and Eleventh Circuits that double jeopardy problems can be avoided if, although separate, the civil and criminal proceedings are "coordinated," *see Millan*, 2 F.3d at 20; *One Single Family Residence*, 13 F.3d at 1499, flies in the face of language and logic. The proceedings are still separate, with separate judges, fact-finders, and opportunities to undermine the defense. As the Tenth Circuit has recognized, *9844 South Titan Court*, 75 F.3d at 1487-88, coordinating these separate proceedings may only increase the pressure on some of the values the Double Jeopardy Clause protects by allowing one government attorney to take full advantage of the accumulated knowledge and procedural finesse of the other.

the possibility of having both issues tried before the same trier of fact (presumably in a bifurcated verdict procedure like that used in criminal forfeitures, *see* Smith, *supra*, at 11-14, 14-35 - 38.2). The principal question would then be whether the government must relinquish the advantage of whatever lower burden of proof is permissible in civil proceedings when it decides to prosecute the same conduct.

In a joint proceeding, moreover, the Due Process Clause might limit the government's use of some of the favorable procedures (such as discovery) attached to civil forfeiture. But, the Court can and should allow Congress to decide whether it wishes to provide for such joint proceedings and how to structure them before addressing constitutional questions not raised by these cases.

Finally, the state *amici* argue that application of double jeopardy principles to the states would be burdensome. *See* Brief *Amicus Curiae* of the State of Connecticut, *et al.* But state legislatures would continue to have the same generous options that Congress has: they may use criminal instead of civil forfeiture when they intend to punish; they may provide for combined civil forfeiture/criminal proceedings; or they may craft forfeiture statutes limited to remedial goals (which could then be brought separately). The only thing that they may not do is to punish what they themselves have defined as the same offense, serving what they themselves have structured as punitive goals, in two separate proceedings. The Double Jeopardy Clause demands no less.

CONCLUSION

For the reasons stated above, the judgments below should be affirmed.

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Dated: March 22, 1996

(13) (16)

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BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENTS

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Cheh, Mary M., *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives*, 42 HASTINGS L.J. 1325 (1991) 19

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Cox, S., *Halper's Continuing Double Jeopardy Implications: A Thorn By Any Other Name Would Prick As Deep*, 39 ST. LOUIS UNIV. L.J. 1235 (March 1996) 11, 14, 23

Ely, James W., Jr., THE GUARDIAN OF EVERY OTHER RIGHT: THE CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (1992) 4

Essays of an Old Whig, *Philadelphia Independent Gazetteer*, October, 1787 – February, 1788 in 3 THE ANTI-FEDERALIST PAPERS 20

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Gordon, *Prosecutors Who Seize Too Much and the Theories They Love: Money Laundering, Facilitation, and Forfeiture*, 44 DUKE L.J. 744 (1995) 19

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King, Nancy J., *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101 (1995). 12, 13, 15

Levy, Leonard L., A LICENSE TO STEAL, THE FORFEITURE OF PROPERTY, (1996) 19

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Levy, Leonard W., ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION (1988) 5

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Piety, T., *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L.REV. 911 (1991) 19

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Schneider & Flaherty, *Presumed Guilty: The Law's Victims in the War on Drugs*, PITTSBURGH PRESS, August 11-September 6, 1991 19

Schwarz, THE BILL OF RIGHTS, Vol. II at 1031 20

Smith, David B., PROSECUTION AND DEFENSE OF FORFEITURE CASES, Matthew Bender (1995) 24, 27

Terwilliger, George J., Principal Deputy Associate Attorney General, "*Need for Increased Emphasis on Criminal Forfeiture*," Memorandum 27-28

U.S. Department of Justice, Civil Forfeiture: TRACING THE PROCEEDS OF NARCOTICS TRAFFICKING, November 1988, Addendum, January 1992 23

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BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS [1]

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia non-profit corporation

[1] All parties have consented to the filing of this brief pursuant to Rule 37.3 of the Rules of this Court.

with a membership of more than 9,000 attorneys and 30,000 affiliate members, including representatives from every state. The American Bar Association awards NACDL full representation in its House of Delegates.

NACDL was founded over thirty-five years ago to ensure justice and due process for persons accused of crime; to foster the integrity, independence and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice.

NACDL has long been troubled by the expanding use of civil forfeiture proceedings in our criminal justice system. We have deep concerns about the fairness of some of these laws and the aggressive way they are used by state and federal prosecutors to inflict punishment and to deprive individuals of significant property interests, often without any of the constitutional and procedural protections generally accorded to either criminal or civil defendants.

In its past several terms, this Court has reviewed a substantial number of forfeiture cases. In its decisions, the Court has endeavored to establish legal safeguards to appropriately restrain the government's increasingly aggressive use of the forfeiture weapon. The cases at bar provide the Court with an opportunity to correct what has become a pervasive government practice: advancing the policies of criminal prosecution through civil forfeitures. Thus, NACDL has a vital interest in the outcome of these cases, and urges the Court to affirm the decisions below.

SUMMARY OF ARGUMENT

The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments (and attempts to punish) for the same offense. *United States v. Halper*, 109

S.Ct. 1892 (1989). A civil as well as criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment. *Id.* at 448. For double jeopardy analysis, the order of punishment does not make a difference.

The government's argument that the civil forfeiture statutes in the cases at bar do not constitute punishment for double jeopardy purposes is built on a false dichotomy, and is inconsistent with prior decisions of this Court. *Austin v. United States*, 113 S.Ct. 2801 (1993).

Among the relevant inquiries for double jeopardy purposes is whether the government's conduct constitutes oppression of the sort against which the Double Jeopardy Clause was intended to protect. Despite the importance of private property as a "concomitant to liberty," few proceedings in our judicial system are more oppressive than a civil forfeiture proceeding, especially when that proceeding occurs while the possibility, or actuality, of a criminal prosecution based upon the same violation looms. The government enjoys tremendous strategic and procedural advantages in such situations. For example, people are often forced to defend against civil forfeiture without benefit of counsel, either because they were indigent to begin with, or because the government has rendered them indigent through seizure of their assets. Thus, claimants are often left in the procedural posture of defending against the government with one, if not both, hand(s) tied behind their back.

By requiring the government to seek imprisonment, fines and forfeitures in one proceeding, the decisions below promote both fairness and judicial efficiency. The government already has this ability in most cases through the use of criminal forfeiture statutes.

ARGUMENT

I. THE PROTECTION OF PRIVATE PROPERTY RIGHTS IS CENTRAL TO OUR HERITAGE.

In order to analyze and decide the issues presented in these consolidated appeals, the Court must first examine the nature of the rights at stake. In determining whether forfeiture of property is punitive, and whether the Double Jeopardy Clause protects against multiple attempts to punish for the same violation of law through both criminal prosecution and forfeiture of property in separate proceedings, a brief review of the importance of property rights in our society is indispensable to a resolution of the issues before the Court.

Throughout the history of western democratic societies, the importance of private property as a "concomitant to liberty" has been widely recognized. "The Fifth Amendment embodies the Lockean belief that liberty and the right to possess property are an interwoven whole; neither life, liberty, nor property can be arbitrarily or capriciously denied us by government." *United States v. $12,390.00*, 956 F.2d 801, 810 (8th Cir. 1992) (Beam, J., dissenting in part). *See* John Locke, THE SECOND TREATISE ON CIVIL GOVERNMENT, ¶¶ 123-42.[2] Indeed, this Court has recognized that "a fundamental interdependence exists between the personal right to liberty

[2] The Founders understood that private property was a fundamental aspect of personal liberty and, moreover, a major goal of the Revolution itself. In the Declaration of Independence, Jefferson, borrowing from John Locke, asserted that the goals of the nation were "life, liberty, and the pursuit of happiness." Locke's language, of course, had been "life, liberty, and property." Jefferson rightly understood that property was a part of both liberty and the fundamental happiness of the people. The demand for a Bill of Rights naturally included the demand for the protection of property, which the Founders regarded as "the guardian of every other right." James W. Ely, Jr., THE GUARDIAN OF EVERY OTHER RIGHT: THE CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (1992).

and the personal right in property. Neither could have meaning without the other." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552, 31 L.Ed.2d 424, 92 S.Ct. 1113 (1972); Likewise, as recently observed by this Court, "[i]ndividual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, 114 S.Ct. 492, 505 (1993).

The nature and quality of a citizen's freedom and security relates directly to his or her ability to own property and to be secure from governmental intrusion therein. "[I]n a free government almost all other rights would become worthless if the government possessed power over the private fortune of every citizen." *Chicago, Burlington & Quincy R.R. v. Chicago,* 166 U.S. 226, 236, 41 L.Ed. 979, 17 S.Ct. 581 (1897); *see also* Charles A. Reich, *The New Property,* 73 YALE L.J. 733, 771-74 (1964) (asserting that a person's freedom and security depend on his ability to protect his property from irrational government interference); Leonard W. Levy, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION, 276-77 (1988).

II. THE DOUBLE JEOPARDY CLAUSE PROTECTS AGAINST MULTIPLE PUNISHMENTS AS WELL AS SUCCESSIVE PROSECUTIONS.

It has long been held that the Double Jeopardy Clause of the federal constitution protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.[3] *Ex Parte Lange,* 18 Wall. 163, 168, 21 L.Ed. 872 (1873) ("If there is

[3] The Double Jeopardy Clause protects not only against multiple punishments, but also--perhaps especially--against multiple *attempts* to punish ("[n]or shall one be twice put in jeopardy.") *See, Witte v. United States,* 115 S.Ct. 2199, 2205 (1995).

anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense"). *See also, North Carolina v. Pearce,* 395 U.S. 711, 727, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969) (Douglas, J., dissenting) ("The theory of Double Jeopardy is that a person need run the gantlet only once. The gantlet is the risk of punishment which the State or Federal Government imposes for that particular conduct."); *United States v. Halper,* 490 U.S. 435, 104 L.Ed.2d 487, 109 S.Ct. 1892 (1989); *Dept. of Revenue of Montana v. Kurth Ranch,* 511 U.S. ___, 128 L.Ed.2d 767, 114 S.Ct. 1937 (1994).

The underlying idea is that the government, with all its resources and power, should not be allowed to make repeated attempts to punish an individual for the same offense, thereby subjecting an individual "to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Green v. United States,* 355 U.S. 184, 187-88, 2 L.Ed.2d 199, 78 S.Ct. 547 (1971). "The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued." *Id.* at 198.

Thus, despite recent concerns expressed by some members of the Court,[4] the protection against multiple punishments "has deep roots in our history and jurisprudence," *Halper, supra,* 490 U.S. at 440, and is "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced." *See, e.g., Bennis v. Michigan,* ___ S.Ct. ___, ___, 1996 WL 88269 at *7 (1996), quoting) *J.W. Goldsmith, Jr.-Grant Co. v. United States,* 254 U.S. 505, 511, 65 L.Ed.2d

[4] *See, Kurth Ranch, supra,* 114 S.Ct. at 1955-59 (Scalia, J., joined by Thomas, J., dissenting); *Witte, supra,* 115 S.Ct. at 2209-10 (1995) (Scalia, J., joined by Thomas, J., concurring).

376, 41 S.Ct. 189 (1921 (discussing another long-standing principle).

Apparently recognizing that this Court is not likely to overrule *Halper*, the government attempts to severely narrow *Halper's* holding by arguing that the protection against multiple punishments can arise only after a criminal prosecution. The government's argument is devoid of merit. Nothing in *Halper* suggests such a narrow interpretation. *Halper* framed "the sole issue before it" as "whether the statutory penalty authorized by the civil False Claims Act, under which Halper is subject to liability of $130,000 for false claims amounting to $585, constitutes a second 'punishment' for the purpose of double jeopardy analysis." *Halper*, 490 U.S. at 441. Similarly, the Court observed that "[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purpose of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads. . . . Simply put, a civil as well as criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment." *Id.*, at 448.

The government's argument rests, at bottom, on a single sentence in the *Halper* opinion: "We therefore hold that under the Double Jeopardy Clause, a defendant who has already been punished *in a criminal prosecution* may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." *Halper*, at 448-49 (emphasis supplied). That sentence, however, merely identifies the factual context of the case before the Court. There is no discussion or analysis anywhere in the Court's opinion of the need for a prior criminal prosecution to trigger double jeopardy analysis. Indeed, the Court did not limit its holding

only to punishments which follow criminal prosecutions, and even left open the notion that double jeopardy could bar multiple *civil* punishments: "Nothing in today's ruling precludes the Government from seeking the full civil penalty against a defendant who previously has not been *punished* for the same conduct, even if the civil sanction imposed is punitive." *Id.*, at 450. Significantly, the Court did not equate punishment with criminal prosecution. Rather, it squarely rejected that analogy. *Id.* at 448.

The government's assertion that the order of proceedings should make any constitutional difference is not based on reasoning or analysis, but merely the government's hope that *Halper* can be narrowly limited to its facts. However, every circuit court has recognized that there is no principled basis for so limiting *Halper's* double jeopardy reasoning. Common sense dictates that regardless of the order of the civil and criminal proceedings, the Double Jeopardy Clause will bar the second sanction if both the first and the second sanctions are deemed punishment. As recently observed by Justice Scalia, "[i]f there is a constitutional prohibition on multiple punishments, the order of punishment cannot possibly make any difference." *Kurth Ranch, supra*, 14 S.Ct. at 1957 (Scalia, J., dissenting), citing *United States v. Sanchez-Escareno*, 950 F.2d 193, 200 (5th Cir. 1991), *cert. denied*, 113 S.Ct. 123 (1992).[5]

Nevertheless, the government presses its argument that for double jeopardy purposes, it is irrelevant how severely a person is punished so long as that punishment is meted out

[5] *See also, United States v. Morgan*, 51 F.3d 1105 (2nd Cir. 1995); *United States v. Williams*, 56 F.3d 63 (4th Cir. 1995); *United States v. Tilley*, 18 F.3d 295, 298, n. 5 (5th Cir. 1994); *United States v. Austin*, 54 F.3d 394, 399 (7th Cir. 1995); *United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990); *United States v. Meyers*, 897 F.2d 1126, 1127 (11th Cir. 1990), *cert. denied*, 498 U.S. 865 (1990).

prior to a criminal prosecution. But *Halper* itself provides the clearest example of why the order of punishment cannot possibly make any difference. Under the government's reasoning, the government would have been free to exact the full measure of the civil penalty against Halper (more than $130,000 based upon Halper's overcharges in the sum of $535) *and* criminally prosecute him for the same conduct without running afoul of the Double Jeopardy Clause, so long as the civil penalty preceded the criminal prosecution. This cannot be right. Indeed, as discussed, infra at pp. 23-26, being subjected to a civil forfeiture proceeding *prior* to a criminal prosecution can be even more oppressive than the reverse.

III. CIVIL FORFEITURES PURSUANT TO 21 U.S.C. §881 CONSTITUTE PUNISHMENT.

A civil statute inflicting a monetary penalty can be sufficiently punitive that its use against a citizen operates as a bar to subsequent governmental attempts to punish.[6] Moreover,

[6] In *Halper*, this Court held that a civil sanction constituting punishment may not be imposed following a criminal prosecution based on the same offense without contravening double jeopardy protection against multiple punishments. The Court then turned to the question of whether, and under what circumstances, a civil penalty may constitute punishment for the purpose of the Double Jeopardy Clause. Rejecting the argument that only proceedings which are essentially criminal can result in punishment, the Court held that whether a nominally civil sanction is sufficiently punitive cannot be determined solely by statutory interpretation. The Court observed that "the labels 'criminal' and 'civil' are not of paramount importance," 490 U.S. 447, and concluded:

> [I]t follows from these premises that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either a retributive or

this Court has previously held that at least some of the civil forfeiture statutes at issue here (21 U.S.C. §881(a)(4) and (a)(7)) constitute punishment.[7]

> In light of the historical understanding of forfeiture as punishment, the clear focus of §§881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish, we cannot conclude that forfeiture under §§881(a)(4) and (a)(7) serves solely a remedial purpose. We therefore conclude that forfeiture under these provisions constitutes payment to a sovereign as punishment for some offense.

Austin v. United States, 509 U.S. ___, 125 L.Ed.2d 488, 113 S.Ct. 2801, 2812 (1993). Every federal circuit court of appeal to have considered the issue, post *Austin*, has agreed that these statutes impose punishment for purposes of double jeopardy analysis.[8]

The government's argument that the civil forfeiture statutes in the cases at bar did not constitute punishment for double jeopardy purposes is built on a false dichotomy, and is inconsistent with prior decisions of this Court. First, the

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> deterrent purposes, is punishment, as we have come to understand the term.

490 U.S. at 448.

[7] We also agree with Respondents Arlt and Wren, for the reasons expressed in their brief, that forfeitures pursuant to 21 U.S.C. §881(a)(6) and 18 U.S.C. §981(a)(1) constitute punishment.

[8] In addition to the Sixth and Ninth Circuits in the cases at bar, *see United States v. Baird*, 63 F.3d 1213 (3rd Cir. 1995), *cert. denied*, 116 S.Ct. 909 (1996); *United States v. Perez*, 70 F.3d 345 (5th Cir. 1995); *United States v. Torres*, 28 F.3d 1463 (7th Cir), *cert. denied*, 115 S.Ct. 669 (1994); *United States v. 9844 S. Titan Court*, ___ F.3d ___, 1996 WL 49002 (10th Cir. 1996).

government repeatedly refers not to civil forfeiture statutes, but to statutes that are pervasively punitive or solely remedial. Second, the government argues that it is only in "a rare case" that a forfeiture would constitute punishment. In *Austin*, however, this Court applied *Halper's* reasoning to a forfeiture case involving a typical drug trafficking offense rather than a small-gauge money-penalty.[9] *See*, generally, S. Cox, *Halper's Continuing Double Jeopardy Implications: A Thorn By Any Other Name Would Prick As Deep*, 39 ST. LOUIS UNIV. L.J. 1235, 1249-50 (March 1996). As Professor Cox observes, "If anything, the *Austin* Court seemed to indicate that presumptions in favor of *upholding* a civil penalty as a non-punishment would more likely apply in the fixed-penalty context rather than in other situations." *Ibid.* Indeed, distinguishing civil forfeiture statutes from the fixed-penalty provisions in *Halper*, this Court in *Austin* observed:

> In *Halper*, we focused on "the sanction as applied in the individual case. . . In this case, however, it makes sense to focus on [the forfeiture statute] as a whole. *Halper* involved a small, fixed-penalty provision, which in the ordinary case . . . can be said to do no more than make the government whole." The value of the conveyances and real property forfeitable under Sections 881(a)(4) and (a)(7), on the other hand, can vary so dramatically that any relationship between the Government's actual costs and the amount of the sanction is merely coincidental.

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[9] This Court in *Austin* emphasized the following language from *Halper* in rejecting government claims that forfeiture's remedial purposes meant it could not be considered punishment: "[A] civil sanction that cannot be fairly said *solely* to serve a remedial purpose , but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." 113 S.Ct. at 2812 (emphasis added in *Austin*) (quoting *Halper*, 490 U.S. at 448).

Austin, 113 S.Ct. at 2812, n.14 (citations omitted) (quoting *Halper*, 490 U.S. at 448, 449). *See*, Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101 (1995).

The government's argument completely ignores *Austin's* finding that civil forfeiture is highly punitive (unlike graduated civil money penalties).[10] Moreover, the government mistakenly equates fines cases with forfeiture cases ("The holding of *Halper* requires a case-by-case inquiry into the character of the actual sanctions imposed in a particular case as a prerequisite for multiple punishments protection." Pet. Brief at 13). However, what *Halper* held was much narrower than that. *Halper* held that where a statute is designed to estimate liquidated damages, it will be the rare case in which sanctions applied pursuant to the statute do not approximate liquidated damages.[11] Conversely, where, as here, the statutes

[10] We agree that the government is entitled to bring truly remedial actions in addition to criminal penalties. Moreover, given the difficulty of accurately measuring the government's loss from a given act, there can be some leeway. As this Court noted in *Halper*, at 446, "the Government . . . may demand compensation according to somewhat imprecise formulas, such as liquidated damages or a fixed sum plus double damages . . ." Thus, when the government makes a good-faith effort to estimate, by statute, the likely harms of the forbidden act, this Court is hesitant to find the effort suspect. But where, as here, the statutes *do not even attempt* to weigh the amount of the property owner's loss against the value of the harm the property owner caused (or is likely to cause), such a claim is without credibility. Such statutes can only be justified on the grounds that the property owner's conduct deserves to be punished.

[11] The Court's holding follows necessarily from the premise: if reasonable liquidated damages are not punitive, then a statute seeking fines in the nature of liquidated damages will not generally be punitive. It will only be in the rare case, as in *Halper*, where a large number of small infractions are each penalized with fines amounting, in total, to almost 250 times the value of the government's loss, that an individual is punished by the operation of such fines.

are *not* designed to estimate liquidated damages, it will not be "the rare case" in which one is placed in jeopardy of punishment pursuant to the statutes. *See*, King, *Portioning Punishment*, *supra*, at 171 ("For instance, it made sense for the Court in *Halper* to compare the sanction there to the government loss -- the penalty provisions of the False Claims Act were calibrated to actual losses caused by the defendant's culpable acts. But other sanctions, like those in *Austin*, are set without reference to government loss.").

As the Court in *Austin* observed, it would not be "fair" to characterize 21 U.S.C. §881(a)(4) and (a)(7), providing for forfeiture of conveyances and real estate that have "facilitated" narcotics activity, as serving a remedial purpose. *Austin*, 113 S.Ct. at 2812 and n.14. A judge or prosecutor cannot strip punishment of its punitive character simply by offering an after-the-fact accounting of the government's costs of investigating and prosecuting crime that arguably justify a particular penalty under the statute, because the test is one of legislative purpose as well as punitive effect.[12] Accordingly, the Court in *Austin* correctly refused to compare the value of the Austins' forfeited assets with the government's costs in order to determine whether the forfeiture was punishment. Just as a criminal fine does not become remedial simply because its amount happens to resemble government losses, the forfeiture of an asset under a punitive statute does

[12] The government does not dispute the importance of the purpose of the statute. "Under . . . *Halper*, the issue whether a particular civil sanction amounts to 'punishment' within the meaning of the Double Jeopardy Clause turns on an analysis of the sanction's purpose. 490 U.S. at 448." Pet. Brief at 37. Nevertheless, the government concedes that civil forfeiture statutes were intended to have a "powerful deterrent" purpose, Pet. Brief at 43, n.11, citing *Austin's* reference to the legislative history of the drug forfeiture statutes. 113 S.Ct. at 2811 (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 195 (1983)).

not cease to be punishment just because it happens to roughly equal the government's costs of detection and enforcement.

The government seeks to create a false dichotomy based on only two classes of cases: those which trigger the full panoply of criminal law protections, and those which receive no protections at all. Thus, the government argues, if a law is sufficiently penal to trigger double jeopardy protection, it must also trigger all other criminal protections.[13] But as this Court's holdings make clear, that is not the case.[14] Together, *Halper* and *Austin* create a *three* tiered hierarchy of civil sanctions: (1) sanctions that are not punitive, which require only the safeguards typically afforded to civil litigants; (2) punitive civil sanctions, which trigger constitutional limits on the multiplicity and severity of punishment; and (3) sanctions

[13] The government's assertion that the tax imposed in *Kurth Ranch* "may be best understood as falling into the long line of decisions, including *Mitchell, Mendoza-Martinez* and *Ward*, that have considered whether a civil statute is so inherently punitive in nature that the safeguards applicable to criminal prosecutions must be applied" (Pet. Brief at 34) illustrates the fallacy of the government's argument. *Halper* rejected the *Kennedy-Ward* all-or-nothing approach to civil proceedings. "The unstated but important *Halper* implication is that to pretend that punishment is not administered in civil proceedings would eventually strain common sense and the concomitant credibility upon which our legal system must ultimately rest for support of the rightness of its pronouncements." Cox, *Halper's Continuing Double Jeopardy Implications, supra*, at 1247. Under Professor Cox's reading of *Halper*, the whole point of rejecting the *Kennedy-Ward* analysis for civil punishments is to make clear that civil proceedings which punish can trigger some constitutional protections without triggering all the constitutional protections associated with purely criminal prosecutions. *Id.* at 1248, n.9. Clearly, the Court did not hold that Montana's administrative drug tax proceeding triggered such constitutional protections.

[14] *See, Austin*, 113 S.Ct. at 2805 ("Thus, the question is not, as the United States would have it, whether forfeiture under §§881(a)(4) and (a)(7) is civil or criminal, but rather whether it is punishment.").

that are essentially criminal, which activate all constitutional rights normally associated with criminal cases.

In *Kurth Ranch*, the Court followed the same categorical approach it followed in *Austin*. Six members of the Court explicitly agreed that *Halper's* fact-dependent method of determining whether the exaction is remedial or punitive "simply does not work in the case of a tax statute." *Kurth Ranch*, 114 S.Ct. at 1948 (Rehnquist, C.J., dissenting).

Only Justice O'Connor would have followed *Halper's* fact-dependent approach. 114 S.Ct. at 1952-55 (O'Connor, J., dissenting). Justice O'Connor observed that the Ninth Circuit had recognized that imposition of the drug tax on the Kurths' possession of marijuana would not be punishment if the sanction bore some rational relationship to "the staggering costs associated with fighting drug abuse in this country." 114 S.Ct. at 1954 (quoting *In re Kurth Ranch*, 986 F.2d 1308, 1312 (9th Cir. 1993)). Justice O'Connor stated her view that *Halper* requires that

> the defendant must first show the absence of a rational relationship between the amount of the sanction and the government's nonpunitive objectives. The burden then shifts to the government to justify the sanction with reference to the particular case.

114 S.Ct. at 1954.[15]

[15] *Supra* at Professor King (*Portioning Punishment, supra*, 176-77) observes:

> "Under Justice O'Connor's test in *Kurth Ranch*, the amount of government loss caused by any given wrong can be manipulated with so little effort that almost any sanction, it seems, can be explained as compensation. The test would classify as rough remedial justice any civil award against any defendant involved in drug activity, as long as the award does not exceed the defendant's fair share of not only the state's drug en-

This Court's rejection of the *Halper* case-by-case approach in *Austin* and *Kurth Ranch* is eminently logical. As Chief Justice Rehnquist explains, the case-by-case approach was adopted in *Halper*

> because compensation for the Government's loss is the avowed purpose of a civil penalty statute. But here we are confronted with a tax statute, and the purpose of a tax statute is not to recover the costs incurred by the Government for bringing someone to book for some violation of law, but is instead to either raise revenue, deter conduct, or both. Thus, despite Justice O'Connor's attempt to view this case through the *Halper* lens . . . the reasoning quite properly employed in *Halper* to decide whether the exaction was remedial or punitive simply does not work in the case of a tax statute.

Kurth Ranch, 114 S.Ct. at 1949-50 (citations omitted) (Rehnquist, C.J., dissenting). The Court majority adopted

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forcement budget (past, present, and future) but also drug abuse education, deterrence, and treatment expenses. The State of Montana in its brief to the Court in *Kurth Ranch* noted that one study estimated that in 1980 that 'the total direct and indirect costs of drugs on society was almost 47 billion dollars.' It would be hard to come up with a dollar limit over which any drug-related forfeiture, tax, or other sanction becomes punitive under this theory.

Compensable harm must be limited to that caused by the defendant's particular conduct, not by the actions of others. A broad definition of harm that includes harm from others like the defendant, and foreseeable as well as actual harm, makes sense if the sanction was meant to *deter* conduct; deterrence looks forward, toward expected harm from all future violators. Conversely, compensation faces back in time and is actor-specific."

Chief Justice Rehnquist's reasoning on this point. 114 S.Ct. at 1948.

Like a tax statute, the purpose of a forfeiture statute is not to recover the "actual damages" or the costs incurred by the government as a result of the defendant's conduct. *Kurth Ranch*, 114 S.Ct. at 1948. Rather, the purpose of most forfeiture statutes, including the ones involved in these cases, is first and foremost *punishment*, *i.e.*, deterrence and retribution. *Austin, supra*; *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 686-87, 40 L.Ed.2d 452, 94 S.Ct. 2080 (1974) (forfeiture serves "punitive and deterrent purposes" and "impos[es] an economic penalty").

The government also complains that the appellate courts' categorical approach deprives it of any opportunity to prove the magnitude of the losses it suffered from the claimants' drug trafficking activity. But the government suffers no "losses" or damages from drug activity -- at least not in the same sense that it suffers a loss or actual damages when a contractor cheats the government. It is true that drug trafficking imposes enormous costs on society as a whole and that the Government spends billions of dollars on law enforcement and anti-drug programs. But those general social and governmental costs cannot be rationally accounted for in assessing whether a particular forfeiture imposes punishment. *Kurth Ranch*, 114 S.Ct at 1948; *Austin*, 113 S.Ct. at 2812 n.14 ("any relationship between the government's actual costs and the amount of the sanction is merely coincidental").

In the final analysis, the government's argument that forfeiture serves remedial purposes is undermined by the government's own words. As this Court recently observed in *James Daniel Good Real Property, supra*, the government "has a direct pecuniary interest in the outcome of [forfeiture] proceeding[s]." 114 S.Ct. at 502. The Court further observed

The extent of the Government's financial stake in drug forfeiture is apparent from a 1990 memo in which the Attorney General urged United States Attorneys to increase the volume of forfeitures in order to meet the Department of Justice's annual budget target:

"We must significantly increase production to reach our budget target.

". . . Failure to achieve the $470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990." Executive Office for U.S. Attorneys, U.S. Department of Justice, 38 U.S. Attorney's Bulletin, 180 (Aug. 15, 1990).

Id., 114 S.Ct. at 502, n.2. It should thus be clear to all that the government regards asset forfeiture as a substantial revenue enhancement program, not a remedial policy.

IV. A CIVIL FORFEITURE PROCEEDING HAS ALL OF THE OPPRESSIVE ASPECTS OF A CRIMINAL PROSECUTION, BUT AFFORDS FEW OF THE CONSTITUTIONAL PROTECTIONS.

The government concedes that "[t]he relevant inquiry [for double jeopardy purposes] is whether the government's conduct 'constitute[s] governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect,' " Pet. Brief at 57-58 (internal quotation marks omitted). Few proceedings in our judicial system are more oppressive than a civil forfeiture proceeding,[16] especially

[16] The abuse of civil forfeiture laws, and the concomitant destruction of private property rights, has been well documented in both scholarly and popular publications. *See, e.g.*, Hon. Henry J. Hyde, FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE?, CATO Institute (1995); Leonard L. Levy, A LICENSE TO STEAL, THE FORFEITURE OF PROPERTY, University of North Carolina Press (1996); T. Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L.REV. 911 (1991); Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives*, 42 HASTINGS L.J. 1325 (1991); 1994 Symposium: What Price Civil Forfeiture? Constitutional Implications and Reform Initiatives, Mary M. Cheh, *Can Something This Easy, Quick and Profitable Also be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 NEW YORK L.SCH.L.R. 1; George Fishman, *Civil Asset Forfeiture Reform: The Agenda Before Congress*, 39 NEW YORK L.S.L.R. 121 (1994); Steven L. Kessler, *For Want of a Nail: Forfeiture and the Bill of Rights*, 39 NEW YORK L.SCH.L.R. 205 (1994); Anthony J. Franze, *Casualties of War?: Drugs, Civil Forfeiture and the Plight of the Innocent Owner*, 70 NOTRE DAME L.REV. 369 (1994); Gordon, *Prosecutors Who Seize Too Much and the Theories They Love: Money Laundering, Facilitation, and Forfeiture*, 44 DUKE L.J. 744 (1995); Bullock, *Filling the Coffers With Civil Forfeitures*, LEGAL TIMES, November 1, 1993; Brazil & Berry, *Tainted Cash or Easy Money?*, ORLANDO SENTINEL TRIBUNE, June 14-15, 1992; Schneider & Flaherty, *Presumed Guilty: The Law's Victims in the War on Drugs*, PITTSBURGH PRESS, August 11-September 6, 1991.

when that proceeding occurs while the possibility of a criminal prosecution based upon the same violation looms. Indeed, *even standing alone*, civil forfeiture proceedings have long been recognized as among the most oppressive actions that can be brought by the government. As was written over two hundred years ago by pundits of the day

> In all actions for penalties, forfeitures and public debts, as well as many others, the government is a party and the whole weight of government is thrown into the scale of the prosecution [,] yet these are all of them civil causes. -- These penalties, forfeitures and demands of public debts may be multiplied at the will and the pleasure of the government. -- These modes of harassing the subject perhaps been

> more effectual than direct criminal prosecutions. -- Yet in the reign of Henry the Seventh of England, Empson and Dudley acquired an infamous immortality by these prosecutions for penalties and forfeitures. -- Yet all of these prosecutions were in the form of civil actions; they are undoubtedly objects highly alluring to a government. -- They fill the public coffers and enable the government to employ its minions at a cheap rate. They are a profitable kind of revenge.

Essays of an Old Whig, *Philadelphia Independent Gazetteer*, October, 1787 -- February, 1788 in 3 THE ANTI-FEDERALIST PAPERS, Section 3.16.[17] *See also,* The Honorable George C. Pratt & William B. Peterson, *Civil Forfeiture in the Second Circuit,* 65 ST. JOHN'S L. REV. 653 (1991); *United States v. All Assets of Statewide Auto Parts, Inc., etc.*, 971 F.2d 896, 905 (2nd Cir. 1992) ("[w]e continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes.").

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[17] The Anti-Federalists based their campaign on ideas such as this. Indeed, it was to overcome such objections that the Bill of Rights was added. The debate as to whether to adopt the Bill of Rights was not over whether such rights existed or were important, but that the existence of such a list could be interpreted as excluding everything not specifically set forth therein, thereby inadvertently allowing rights to be trampled on.

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights not singled out were intended to be assigned into the hands of the General Government, and were consequently insecure.

Schwarz, THE BILL OF RIGHTS, Vol. II at 1031 (Speech by Madison on June 8, 1789 in presenting proposed Bill of Rights to Congress).

This Court in *Green v. United States*, *supra*, observed that the Double Jeopardy Clause reflected the principle that the government, with all its resources and power, should not be allowed to make repeated attempts to punish an individual for an alleged offense, thereby subjecting him "to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . ." 355 U.S. at 187-88. Similarly, the Court in *North Carolina v. Pearce*, *supra*, held that the theory of double jeopardy is that a person should not be required to run the gauntlet more than once. 395 U.S. at 727. Yet, this is precisely what occurs when one is subjected to separate proceedings involving civil forfeiture and criminal prosecution.[18] Respondents were no less oppressed by the additional embarrassment, expense, ordeal, and anxiety because the forfeiture proceedings were civil rather than criminal; and they were forced to "run the gauntlet" more than once.

For double jeopardy purposes, the order in which the proceedings take place simply does not matter. A civil forfei-

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[18] For example, in a recent case in the Southern District of Florida, after convicting CenTrust CEO David Paul for various criminal violations arising out of the mismanagement of CenTrust Savings Bank, the government initiated a civil proceeding based on the same conduct. The criminal proceeding exhausted the defendant's resources, and during the criminal case he suffered near fatal heart problems. Because he has no more resources with which to hire counsel in the civil proceeding, he is forced to represent himself, with all the attendant disadvantages, and is laboring under the additional burden of having to conduct this defense from a prison cell. *See* Doris, *David Paul's CenTrust Saga Continues,* DAILY BUS. REV. (Mon., Feb. 12, 1996) ("Now he describes himself as 'indigent' and 'broke,' a lone David who has a law degree but who never practiced, fending off a goliath of a government team comprising more than a half dozen lawyers.").

ture proceeding following a criminal prosecution for the same violation, and vice versa, will trigger the double jeopardy bar. As the Ninth Circuit observed, below (where the civil forfeiture followed the criminal prosecution after having been stayed during the pendency of the prosecution), "such a coordinated, manipulative prosecution strategy heightens, rather than diminishes, the concern that the government is forcing the individual to 'run the gantlet' more than once." 33 F.3d at 1217. Similarly, in another recent case where the forfeiture proceeding followed a criminal prosecution, the Tenth Circuit observed, "[t]he practice of instituting multiple proceedings against a single defendant, which the government benignly terms a 'coordinated law-enforcement effort,' has as much or more capacity to harass and exhaust the defendant than does a post hoc decision to retry him." *United States v. 9844 South Titan Court, supra*, 1996 WL 49002 at *14 (citations omitted).

Commenting on situations where the civil forfeiture action and the criminal prosecution are ongoing at the *same* time (in separate proceedings), Professor Cox observes:

> The harassment of multiple government prosecutions which seek punishment hardly disappears when both are going on at the same time. The defendant is as effectively, perhaps more effectively, whipsawed by the government's simultaneous two-bites-at-the apple approach as by a wait-and-see second attempt to prosecute. Simultaneous dual prosecutions involving different burdens of proof and different factfinders present a real threat of dual punishment, rather than only a hypothetical threat that the government might seek more in a second proceeding. As the Ninth Circuit correctly concluded, the government *exacerbates* rather than obviates double jeopardy concerns when it tries to team up on the defendant in this way.

S. Cox, *Halper's Continuing Double Jeopardy Implications, supra*, at 1300 and n.193.

However, for the individual (such as Respondent Ursery) against whom the government first launches a civil forfeiture action while contemplating and investigating a criminal case, the oppression and opportunity for abuse is at its worst. In this situation, where the potential for criminal charges exists, not only is the defendant subjected to all of the evils of two proceedings condemned in *Green* and *Pearce*, but the possibility of a criminal prosecution forces a number of additional unpalatable choices. Indeed, this is where the "coordination" of two proceedings emerges as the most pernicious vice.

Discussing the advantages of civil forfeiture proceedings over criminal forfeitures, the U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance training manual No. 1, CIVIL FORFEITURE: TRACING THE PROCEEDS OF NARCOTICS TRAFFICKING, encourages broader and more aggressive use of the civil forfeiture statutes not only because of its advantage with respect to the standard and burden of proof, but also because

> The claimant may be deposed and disclosure of his records compelled. . .And, while the Fifth Amendment may still be asserted, *a civil claimant risks an adverse factual finding by doing so. This possibility places the claimant in a particular bind if criminal charges against him are still pending. Asserting the Fifth Amendment may result in an adverse factual determination, while answering question may have incriminating consequences in the criminal proceedings.*

* * *

> For these reasons, *the civil claimant is in a very difficult position relative to his posture in a criminal trial.* . . . This means that, even when tracing obstacles exist, forfeiture proceedings should be considered *since the government may never be put to its proof.*

U.S. Department of Justice, Asset Forfeiture training manual No. 1, November 1988, Addendum Added January 1992, "The Advantages of Civil Forfeiture," at 2 (emphasis supplied).

Several cases have held that the fact than an individual makes a claim to property in a forfeiture proceeding *is* admissible in a criminal case, and is not shielded by any Fifth Amendment privilege. *Baker v. United States*, 722 F.2d 517, 518-19 (9th Cir. 1983) (implying that there is no Fifth Amendment privilege shielding the filing of a claim for property that the government seizes for forfeiture, characterizing the Fifth Amendment claim as weak, and finding no constitutional impediment to the requirement that claimant incriminate himself to claim ownership of forfeitable property); *United States v. Fifteen Thousand Five Hundred Dollars ($15,500) in U.S. Currency*, 558 F.2d 1359, 1360-61 (9th Cir. 1977) (similar). *See*, D. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES, Matthew Bender (1995), &10.03, 10-39 to 10-41; Note, *Constitutional Rights in Civil Forfeiture Actions*, 88 COLUM. L. REV. 390.

> If a property owner wants an opportunity to regain his property, he must first demonstrate an interest in the property sufficient to establish standing. However, by alleging an interest in the property, a claimant may also provide information that can be used against him by the state in a later criminal trial.

> A claimant may preserve his Fifth Amendment right only by not coming forward and alleging an interest in the property, resulting in the automatic forfeiture of the property.

Id. at 396-97.[19] *But see, United States v. Cretacci*, 62 F.3d 307, 311 (9th Cir. 1995), *petition for cert. pending* (holding that "a defendant's claim of ownership of property that was subject to forfeiture may not be used [to incriminate the defendant in a criminal case]," relying on *United States v. Simmons*, 390 U.S. 377, 394, 19 L.Ed.2d 1247, 88 S.Ct. 967 (1968)).

In addition to the obvious Fifth Amendment problems created by the government's "coordination" of separate civil forfeiture and criminal prosecutions, the government can, and often does, pauperize a person by seizing all of his or her assets, thereby preventing the person from retaining counsel in *either* the criminal prosecution or the civil forfeiture proceeding. Similarly, coordination of separate proceedings increases the risk that grand jury evidence will be used to bolster the civil case, that communication between prosecutors in the civil and criminal cases will ensure that various actions in each case will be timed so as to have the most

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[19] The property owner's predicament has always exceeded that facing other civil litigants who faced the possibility of a subsequent criminal prosecution, because the claimant in most federal forfeiture proceedings has the burden of proof to show why his property is not subject to forfeiture. *See, e.g.*, 21 U.S.C. §881(d) (incorporating burden of proof provisions of 19 U.S.C. §1615). However, with the threat of a criminal indictment, the government can inhibit a claimant's ability to defend the forfeiture by inhibiting his or her ability to testify. *See, e.g., United States v. United States Currency*, 626 F.2d 11, 14-15 (6th Cir. 1980). Because of the burden of proof the Claimant's Fifth Amendment right to remain silent is effectively purchased at the cost of his property. Thus civil forfeiture can be used to extort forfeitures of property that would probably not occur were the proceedings brought in reverse order.

coercive and oppressive effect, and that discovery will be obtained for the civil case through grand jury subpoena or search warrants obtained in the criminal case. See, Robert G. McCampbell, *Parallel Civil and Criminal Proceedings: Six Legal Pitfalls*, 31 CRIM. LAW BULL. 483 (1996). All of these actions upset the fundamental notions of fairness with which the Framers were concerned in constructing a Bill of Rights.

V. THE DECISIONS BELOW PROMOTE THE TWIN GOALS OF FAIRNESS AND JUDICIAL EFFICIENCY.

Although the government and amici supporting the government's position express apprehension about the effect of the decisions below, those concerns are greatly exaggerated. By requiring the government to seek imprisonment, fines and forfeitures in one proceeding, the decisions will promote both fairness and judicial efficiency. The government already has this ability in most cases through the use of criminal forfeiture statutes such as 18 U.S.C. §982 and 21 U.S.C. §853, which include forfeiture provisions for a wide array of criminal offenses.[20] The government has already adapted to these decisions with a minimum of difficulty. Indeed, as one district court recently observed "[t]he single-proceeding approach is now followed in this district and elsewhere . . ." *United States v. McCaslin*, 863 F.Supp. 1299, 1307 (W.D.Wash. 1994). Prosecutors are also now routinely requiring express waivers of double jeopardy rights in plea agreements. Counsel have also been advised that the Department of Justice is seeking legislation specifically

[20] The fact that not all states have similar criminal forfeiture statutes cannot justify dispensing with this deep-rooted constitutional protection. Rather, the solution is for the state legislatures to enact criminal forfeiture provisions.

authorizing civil forfeiture cases to be joined for trial with related criminal prosecutions.[21]

To the extent that *Austin*, *Kurth Ranch*, and the decisions below require prosecutors to pursue criminal forfeitures as part of a single prosecution instead of relying upon separate civil forfeiture proceedings, this development will strongly promote fairness as well as judicial economy. The tactical advantages enjoyed by prosecutors in civil forfeiture proceedings have been well documented. *See, e.g.*, note 16, *supra*. *See also*, 1 D. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES, ¶ 12.10[2], 12-150 (1995):

> Prosecutors enjoy tremendous procedural advantages in civil forfeiture cases. They frequently win because of procedural defaults by claimants or simply because the claimant's funds to pay counsel are soon exhausted -- assuming that the claimant has the financial wherewithal to retain counsel at all. Few civil forfeiture cases ever proceed to trial as a result of these legal and practical obstacles. In a criminal forfeiture case, by contrast, there is a constitutional right to court-appointed counsel for indigent defendants and every case must be decided by a jury after a trial on the merits unless the defendant chooses to waive his or her right to a jury verdict on the forfeiture allegations.

[21] Such combined proceedings have been used even in the absence of explicit statutory authority. *See, e.g., United States v. One 1976 Mercedes Benz 280 S*, 618 F.2d 453, 468 (7th Cir. 1980); *United States v. Young*, 426 F.2d 93 (6th Cir.), *cert. denied*, 400 U.S. 828 (1970); *United States v. Real Property*, 816 F.Supp. 1077, 1085 (E.D.Va. 1993). The government is using combined proceedings now in gambling cases under 18 U.S.C. §1955--belying its contention that such a hybrid proceeding is not possible.

Criminal forfeitures are not only more fair -- they are also more efficient than bringing separate civil proceedings. The Department of Justice has been urging prosecutors to make greater use of criminal forfeiture statutes for years, not because of concern about double jeopardy problems, but simply to promote the efficient use of limited prosecutorial and judicial resources. *See, e.g.*, "*Need for Increased Emphasis on Criminal Forfeiture*," Memorandum from George J. Terwilliger, Principal Deputy Associate Attorney General, to U.S. Attorneys (April 22, 1991); Gary M. Maveal, *The Unemployed Criminal Alternative in the Civil War of Drug Forfeitures*, 30 AM.CRIM.L.REV. 35 (1992). Congress recognized that unitary proceedings are more efficient when it greatly expanded the scope of the criminal forfeiture statutes in 1984. S. Rep. No. 225, 98th Cong., 2d Sess. 210, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3393 ("[i]t is a waste of valuable judicial and prosecutive resources to require separate civil forfeiture proceedings"). Thus, the decisions of the Sixth and Ninth Circuits encourage the government to follow a policy preference long promoted by the Department of Justice and Congress.

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit in No. 95-345, and the judgment of the Court of Appeals for the Ninth Circuit in No. 95-346, should be affirmed.

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March 22, 1996

MOTION FILED

MAR 27 1995

(14) (17)

Nos. 95-345 and 95-346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

GUY JEROME URSERY,

Respondent.

UNITED STATES OF AMERICA,

Petitioner,

v.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, *ET AL.*,

Respondents.

On Writs of Certiorari to
the United States Courts of Appeals
for the Sixth and Ninth Circuits

MOTION OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS FOR LEAVE TO FILE AMICUS CURIAE BRIEF OUT OF TIME IN SUPPORT OF RESPONDENTS

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BEST AVAILABLE COPY

3 pp

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COMES NOW the National Association of Criminal Defense Lawyers and respectfully moves the Court for leave to file an out of time brief amicus curiae in support of Respondents.

The brief was received by the Court at ten p.m. on March 22, 1996. It should have been filed by three p.m. on that date. The delay resulted from a mis-communication between counsel and the printer as to the hour that the brief was due.

Respectfully submitted,

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